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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 20, 2002

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QUESTIONS PRESENTED

1. Are Federal Labor Relations Authority decisions denying unit consolidation subject to district court review where indirect review through unfair labor practice proceedings is "inadequa[te]," 5 U.S.C. § 703?

2. If not, are statutory interpretations announced in these decisions subject to district court review?

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CORPORATE DISCLOSURE STATEMENT

Petitioner Association of Civilian Technicians, Inc., (ACT) a labor organization, is a non-profit corporation. It has no parent company and has issued no stock.

OPINIONS AND ORDERS

The decision below is reported at 283 F.3d 339. The district court decision is not reported. The Federal Labor Relations Authority (FLRA) decision is reported at 55 FLRA 657. The FLRA Regional Director's decision is not reported.

JURISDICTION

The judgment sought to be reviewed was entered March 22, 2002. Rehearing was denied May 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATION

The statutes and regulation involved are 5 U.S.C. §§ 701-704, 706, 7103, 7112, 7114(c)(1), 7117(a), and 7123(a); 10 U.S.C. § 10503; 32 U.S.C. § 709; and Technician Program Regulation 250.1 ¶ 1-4e. Their pertinent text is set out in the appendix.

STATEMENT OF THE CASE

ACT filed with the FLRA a petition to consolidate the union's bargaining units into one unit. Because ACT's units comprise a nationwide majority of bargaining-unit-eligible National Guard technicians employed under 32 U.S.C. § 709, consolidation would by law afford technicians greater

bargaining rights.[1] The goal of the statute governing unit consolidation is to "ensure employees the fullest freedom in exercising the rights guaranteed under" the collective bargaining law. 5 U.S.C. § 7112(a).

The FLRA denied consolidation, saying the Technicians Act, 32 U.S.C. § 709, prohibits consolidation of units across state lines. The FLRA held: (1) the Act "command[s]" that each state Adjutant General have "authority over labor relations" with technicians in the state because otherwise the "statutory scheme is not workable," App. 38a, 40a; and (2) "the proposed consolidated unit would require a structuring of the National Guard inconsistent with the dictates of the Technician Act." App. 48a. The FLRA so held, despite its acknowledgement that "[t]here is no specific reference in the Technician Act to the allocation of labor relations authority." App. 39a.

The FLRA opinion also announced that increased bargaining rights is "not a factor" in determining whether units should be consolidated. App. 46a. The FLRA did not mention the statutory goal of "ensur[ing] employees the fullest freedom in exercising" collective bargaining rights. 5 U.S.C. § 7112(a).

FLRA decisions denying unit consolidation are subject to "indirect" judicial review through unfair labor practice

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[1] The union's current units may not negotiate the subjects of National Guard technician program regulations if there is a "compelling need" for the regulations. 5 U.S.C. § 7117(a)(2). This restriction would not apply to a consolidated unit comprising a nationwide majority of National Guard technicians. Under § 7117(a)(3), the consolidated unit's bargaining rights would "extend to matters which are the subject of" all agency regulations that apply to technicians, not just those regulations for which there is "no compelling need."

(ULP) proceedings. App. 6a. To obtain this review, a local ACT chapter representing a bargaining unit would have to (1) refuse to negotiate with management; (2) hope that an unfair labor practice charge is filed against the chapter; (3) if a charge is filed, argue that management must bargain with a consolidated unit; and (4) after the FLRA rejects the argument and sustains the charge, petition a court of appeals under 5 U.S.C. § 7123 to review the ULP finding and the consolidation denial on which it is based. App. 6a.

Rather than subject a bargaining unit to this ordeal, ACT filed suit in the district court, invoking that court's federal question jurisdiction. 28 U.S.C. § 1331. ACT argued that district court review of the FLRA decision is available because, under 5 U.S.C. §§ 703 and 704, indirect review through ULP proceedings is inadequate. Drawing an unfair labor practice complaint is not certain, and doing so requires that a sacrificial group of employees forego the benefits of collective bargaining throughout duplicative FLRA proceedings and lengthy appellate court review.[2]

ACT also argued that, even if the district court could not review the *decision* denying consolidation, it could review the two major statutory *interpretations* announced in the decision--namely, that (1) the Technicians Act bars unit consolidation across state lines, and (2) increased bargaining rights is "not a factor" in determining appropriateness of unit consolidation. ACT said that it had standing to seek review of the statutory interpretations, apart from its being aggrieved by the FLRA decision, because the decision does not bar ACT from filing a future consolidation petition; and

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[2] In the proceedings below, the FLRA did not deny that indirect review through ULP proceedings is inadequate, within the meaning of 5 U.S.C. §§ 703 and 704.

declaratory relief invalidating the interpretations would be a significant benefit to ACT's pursuit of a new petition.[3] The union argued it therefore could seek declaratory relief, just as if the interpretations had been announced in a regulation or published policy.

The court of appeals rejected ACT's arguments, holding, first, that 5 U.S.C. § 7123 impliedly precludes district court review of the FLRA decision, App. 4a-6a; and, second, that because review of the decision is precluded, review of legal interpretations is limited to constitutional claims. App. 8a.

ARGUMENT

The lower court's decision of the important questions presented conflicts with the precedents of this Court.

I

The court of appeals held district court review of the FLRA decision impliedly precluded by the text of 5 U.S.C. § 7123(a). This statute excludes unit consolidation decisions from the FLRA rulings directly reviewable by appellate petition. Under 5 U.S.C. §§ 703 and 704, however, mere exclusion from an appellate review statute is not "clear and convincing evidence" negating the presumption that district court review is available. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).[4]

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[3] The FLRA did not dispute ACT's standing arguments.

[4] Sections 703 and 704 preclude this inference, since the latter states, "[a]gency action made reviewable by statute *and* final agency action for which there is no other adequate remedy in a court are subject to judicial review" (emphasis added), and the former provides:

The court of appeals also relied on the legislative history, a sentence saying, "As in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units. H.R. Rep. No. 95-1717, at 153 (1978)." App. 5a. The court reasoned: "The Report does not say that there will be 'no circuit court review'; it says there will be 'no judicial review.'" *Id.* The court overlooked, however, that the statement in the Report is inaccurate. Unit determinations *are* subject to judicial review. They are subject, at least, to "indirect" review. An inaccurate sentence asserting "there will be no judicial review" is not clear and convincing evidence that, actually, there *will* be judicial review, but it will be *only* indirect circuit court review, not direct district court review.

The court of appeals also reasoned that the Report's reference to "the private sector" manifests congressional intent to embrace *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987) (*Local 23*), which, according to the court, held "that the National Labor Relations Act's preclusion of direct court of appeals review of certain matters also bars district court . . . review." App. 5a. This reasoning is unacceptable. A judicial decision in 1987 is not evidence of what Congress intended in 1978. And the *Local 23* Court did not hold--contrary to §§ 703 and 704 and *Abbott Laboratories*--that mere preclusion of direct appellate review also bars district court review. In *Local 23* the Court held that allowance of district court review of informal unfair labor practice

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The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute *or, in the absence or inadequacy thereof, any applicable form of legal action*, including actions for declaratory judgment or . . . mandatory injunction . . . in a court of competent jurisdiction. [Emphasis added.]

settlements would be absurd because Congress intended that there be *no* judicial review of these settlements. FLRA unit consolidation decisions, in contrast, *are* subject to review.[5]

The question presented is whether the availability of indirect appellate court review precludes direct district court review. This question is governed by precedents that the court below did not discuss: *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (under 5 U.S.C. § 704, available avenue of judicial review "will oust a district court of its normal jurisdiction" only if avenue is "special and adequate"), and *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984) (intent to preclude alternative avenue of review may be inferred if avenue "would severely disrupt [a] complex and delicate administrative scheme," including judicial review, that Congress expressly has provided).

Indirect review of FLRA unit consolidation decisions through ULP proceedings was not expressly provided by Congress and would not be disrupted by the availability of

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[5] The same point applies to the lower court's reliance on *Physicians National House Staff Ass'n v. Fanning*, 642 F.2d 492, 499 (D.C. Cir. 1980) (in banc). App. 6a. There, the legislative history expressly stated that individuals, and unions that would represent them, are entitled to *no* judicial review of National Labor Relations Board decisions deeming the individuals not to be employees covered by the statute (thus rendering ULP review "unlikely," since only an employer, acting contrary to its interest, could obtain such review). Contrary to the implication in the opinion below, App. 6a, the court in *Physicians National House Staff Ass'n* did not hold that "the union's . . . means of review was through an onerous unfair labor practice proceeding."

district court review.[6] Indirect review of FLRA decisions denying union requests for unit consolidation, moreover, is not "adequate" within the meaning of §§ 703 704, because a union cannot be certain that refusing to bargain will draw a charge, and refusing to bargain is prejudicial to the collective bargaining rights of the affected employees.

For the reasons stated above, the lower court's decision denying district court review of the FLRA's refusal to consolidate ACT's bargaining units is incompatible with the principles of *Bowen*, *Block*, and *Abbott Laboratories*.

II

The court of appeals also erred in holding that, where review of individual agency decisions is precluded, review of legal interpretations is limited to constitutional claims. App. 8a. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 483-84 (1991), the Court held that, where statutes deny review of agency decisions, district court review of agency procedures and standards governing those decisions is nonetheless available, and may consider statutory as well as constitutional claims.

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[6] This contrasts with the statute and legislative history expressly saying that Federal Service Impasses Panel (FSIP) decisions may be reviewed indirectly through ULP proceedings. *See Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984). Limiting review of FSIP decisions to indirect ULP review is proper because ULP proceedings afford the only opportunity for the FLRA to decide the matter. Direct district court review of FSIP decisions would be disruptive because it would by-pass the FLRA entirely. The same is not true, however, of direct district court review of unit consolidation decisions. Indirect ULP review of unit consolidation decisions, moreover, is duplicative, because the FLRA decides the question twice.

The court of appeals acknowledged that the *McNary* principle applies where legal interpretations are announced in unreviewable agency decisions. App. 8a. *See Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) ("general statement of policy" announced in agency decision can be reviewed even if agency decision, itself, may not); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 251 (D.C. Cir. 1986) (*Brock*) (same, because "an agency may choose to announce interpretations through adjudications rather than through rulemakings"). The court below, however, misunderstood this principle.

Contrary to the court's opinion, App. 7a, the reviewability of legal interpretations announced in unreviewable agency decisions is not an "exception[]" to this Court's rejection of "the principle that if the agency gives a reviewable reason for otherwise unreviewable action, the action becomes reviewable." *Id.* (*quoting Interstate Commerce Comm'n v. Brhd of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)). Review of a legal interpretation announced in an unreviewable agency decision simply does not involve--at all--review of the agency decision. The legal interpretation, not the decision in which it appears, is the "agency action" that is reviewed. *Brock*, 783 F.2d at 247-248. The interpretation is reviewed as if it had been announced in a regulation, a policy memorandum, or any of many "informal contexts such as letters." *Crowley Caribbean Transport*, 37 F.3d at 677.[7]

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[7] Since a reviewable legal interpretation "speak[s] to a broad class of parties," *id.*, standing to seek review of the interpretation does not depend on whether one was a party to the unreviewable decision in which the interpretation was announced. As where review of a regulation is sought, standing depends on whether the legal

Contrary to the lower court's opinion, App. 8a, neither of the the FLRA's two major statutory interpretations is "individualized." Both address "a broad class of parties." *Crowley Caribbean Transport*, 37 F.3d at 677. The first prohibits any union representing National Guard technicians from obtaining bargaining unit consolidation across state lines. The second applies in every case in which a proposed consolidated unit would represent a nationwide majority of employees who are subject to an agency's regulations. The appellate court erred when it held these statutory interpretations not reviewable under *McNary*, *Crowley Caribbean Transport*, and *Brock*.

III

Both statutory interpretations are erroneous. Contrary to the FLRA's opinion, the Technicians Act does not require that state adjutants general have "authority over labor relations." App. 38a. As the FLRA itself acknowledged, "[t]here is no specific reference in the Technician Act to the allocation of labor relations authority." App. 39a.

Under 5 U.S.C. § 7103(a)(3), the "agency" with which employees are entitled to bargain is the "Executive agency." The phrase "Executive agency" means an agency of the Executive Branch of the federal government. The federal Executive Branch "agency" here is the Department of Defense. The "head of the agency" empowered under 5 U.S.C. § 7114(c) to approve or disapprove collective bargaining agreements is the Secretary of Defense, who has

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interpretation impacts an ongoing (or perhaps imminent) legal relationship in a way that makes declaratory relief appropriate. *See, e.g.*, *Brock*, 783 F.2d at 246-47. Relief afforded if the interpretation is wrong is merely a declaration to that effect, not reversal, or compelled reconsideration, of the unreviewable decision.

delegated that authority to a Department of Defense official. Appellate Appendix at 12.

When adjutants general negotiate and execute collective bargaining agreements, they act as "duly authorized representatives" of the "agency." 5 U.S.C. § 7114(b)(2). There is no restriction on an agency's authority to determine its "duly authorized representatives" for purposes of collective bargaining. The collective bargaining law vests in the federal Executive Branch agency, the Department of Defense, unrestricted authority to control the agency's participation in collective bargaining.

In *Illinois National Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1402 (D.C. Cir. 1988), the court noted, contrary to the FLRA's view, App. 46a, that authority to bargain with unions representing National Guard technicians is a prerogative of "*the Secretary* or those to whom he delegated his authority under the [Technicians] Act." (Emphasis added.) There is no requirement that the Secretary designate any adjutant general to be the Department's labor relations representative.

The Department of Defense, which is responsible for administering the Technicians Act, has not determined that the Act requires delegation to adjutants general of control over labor relations with technicians. As noted above, the Department has delegated "head of the agency" contract approval authority to a federal official, not to the adjutants general. Another important example of the federal control over labor relations is the Department policy requiring that all negotiability disputes and exceptions to arbitration awards be handled or approved by federal officials. Appellate Appendix at 13. Federal personnel located in the

Washington D.C. metropolitan area, not state-level personnel, handle negotiability appeals arising within the bargaining units. *Id.*

Federal officials have legal authority to control all aspects of technician employment that could be subject to collective bargaining. Under 32 U.S.C. § 709, adjutants general's employment of technicians is subject to "regulations prescribed by" federal officials. A National Guard Bureau regulation, TPR 250.1, ¶ 1-4 e states:

> The National Guard Bureau is headed by a Chief who is . . . responsible for exercising the authority that is delegated by the Secretaries concerned. This authority includes acting for the Secretary concerned with respect to administration of the technician program. . . . *This authority includes directing corrective action on any matter not found to be in accordance with applicable laws, rules, regulations, or NGB policy.* [Emphasis added.]

The authority described in this regulation is conferred by 10 U.S.C. § 10503(8) and (10), which state that the National Guard Bureau's duties include "[e]stablishing policies and programs for the employment and use of National Guard technicians under section 709 of title 32" and "[i]ssuing directives, regulations, and publications consistent with approved policies."

Under these legal standards, any condition of employment that technicians could negotiate through collective bargaining is a condition of employment that federal officials could prescribe by regulation or policy.

Federal control of collective bargaining therefore would not violate any legal prerogative of the adjutants general.[8]

The FLRA's second legal interpretation also is erroneous. Statutes must be interpreted and applied in ways that accomplish, not defeat, the statutes' goals. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984); *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be rejected).

The appropriate unit statute, 5 U.S.C. § 7112(a), expressly states that the goal of the statute is to "ensure employees *the fullest* freedom in exercising the *rights* guaranteed under" the collective bargaining law. (Emphasis added). Because the consolidated unit sought by ACT would, as a matter of law, provide employees increased legal rights to negotiate the subjects of National Guard regulations, see n. 1, *supra*, this factor is relevant to determining the appropriateness of consolidation.[9]

Under 5 U.S.C. § 7112(a) all National Guard technicians have a "community of interest" in negotiating the subjects of the regulations which affect their working conditions and apply to all of them uniformly. Footnote 9 of the FLRA's brief below agreed with the union that

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[8] The FLRA's brief below did not dispute any of our points regarding the authority of federal officials to control both labor relations with, and employment of, National Guard technicians.

[9] The district court noted (with understatement): "the Authority's [contrary] interpretation of 7112(a) . . . is not necessarily the best or most obvious one." App. 18a.

"application of the appropriate unit criteria in § 7112(a) itself," which include "community of interest," should be accomplished in a manner that "ensure[s] . . . "fullest freedom in exercising . . . rights," which include collective bargaining rights. See the union's opening brief below at 32-33. The error in the FLRA's brief was its failure to recognize that the FLRA had held just the opposite.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

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Argued February 7, 2002 Decided March 22, 2002

No. 01-5170

Association of Civilian Technicians, Inc.,
Appellant

v.

Federal Labor Relations Authority,
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 99cv02562)

Daniel M. Schember argued the cause and filed the briefs for appellant.

William E. Persina, Attorney, Federal Labor Relations Authority, argued the cause for the appellee. With him on the brief were *David M. Smith*, Solicitor, and *William R. Tobey*, Deputy Solicitor.

Before: Tatel and Garland, *Circuit Judges*, and Williams, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* Tatel.

Tatel, *Circuit Judge*: This case presents a straightforward question of statutory interpretation: Does the statute that gives federal courts of appeals jurisdiction to review decisions of the Federal Labor Relations Authority "other than . . . order[s] . . . involving an appropriate unit determination," leave district courts free to review such determinations pursuant to the Administrative Procedure Act? Answering no, we affirm the district court's dismissal of this challenge to an appropriate unit determination.

I.

National Guard "dual status technicians" (mechanics, machinists, and supply technicians) are federal employees who, pursuant to the National Guard Technicians Act (NGTA), 32 U.S.C. § 709, are separately employed and supervised by the Adjutant General of their respective State Guards. As a condition of employment, they must maintain membership in the state unit of the National Guard for which they work. *Id.* § 709(b). For collective bargaining purposes, dual status technicians are represented by appellant, the Association of Civilian Technicians. Though a national union, the Association bargains separately on behalf of each state-based unit.

This case began when the Association filed a petition with the Federal Labor Relations Authority seeking to have dual status technician bargaining units consolidated into a single, national unit. The Federal Labor Relations Act (FLRA) directs the Authority to determine whether unit determination petitions are "appropriate," based on such factors as whether the determination "will ensure a clear and identifiable community of interest among the employees in

the unit and will promote effective dealings with, and efficiency of the operations of the agency involved." 5 U.S.C. § 7112(a). Applying these standards, the Authority's Regional Director denied the petition. On review, the Authority acknowledged that some evidence—particularly the "interchange" of technicians among State Guards—supported the appropriateness of the proposed national unit. The Authority, however, affirmed the Regional Director's conclusion that more evidence justified maintaining state-based units: Each National Guard state unit has "an individual mission unique to its state or territory"; the NGTA invests Adjutants General with "overall authority over all personnel and labor relations matters in their respective State Activities"; and national collective bargaining would be ineffective because "authority over the day-to-day employment of the technicians . . . is designated by statute to the states." The Association urged the Authority to consider the increased bargaining rights that consolidation would purportedly bring to union members, but the agency declined to do so, agreeing with the Regional Director that the statutory obligation to "ensure employees the fullest freedom in exercising the rights guaranteed under this chapter," *id.*, applies only to units already determined to be appropriate. On the basis of this analysis, the Authority denied the petition for review.

Invoking section 702 of the Administrative Procedure Act—"[a] person . . . aggrieved by agency action . . . is entitled to judicial review thereof," *id.* § 702—the Association sued the Authority in the United States District Court for the District of Columbia, arguing that the unit determination was "arbitrary [and] capricious," *id.* § 706(a)(2)(A). The district court dismissed the case for lack of jurisdiction, relying on FLRA section 7123: "Any person

aggrieved by any final order of the [Federal Labor Relations] Authority *other than an order under . . . section 7112 of this title (involving an appropriate unit determination)*, may . . . institute an action for judicial review of the Authority's order in the [appropriate] United States court of appeals." *Id.* § 7123(a) (emphasis added). The district court concluded that this exception deprives not just courts of appeals, but all federal courts, of jurisdiction to review appropriate unit determinations.

The Association appeals. Our review is de novo. *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995) ("In a case . .. involving a District Court's dismissal of a complaint for lack of subject matter jurisdiction, our standard of review is de novo.").

II.

Notwithstanding eighty-two pages of briefing, this case is not difficult. FLRA section 7123 gives courts of appeals jurisdiction to review Authority decisions "other than . . . order[s] under . . . section 7112 of this title (involving an appropriate unit determination)." 5 U.S.C. § 7123(a). The APA expressly provides that its general review provisions pursuant to which the Association filed this suit, do *not* apply where "statutes preclude judicial review." *Id.* § 701(a)(1); *cf. id.* § 702 ("Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief . . . sought."). Because FLRA section 7123 "precludes judicial review" of appropriate unit determinations, the district court properly held that it lacked jurisdiction to hear this case.

Pointing out that FLRA section 7123 mentions only "courts of appeals," the Association insists that the

provision does not bar *district courts* from reviewing appropriate unit determinations. Like the district court, we disagree. We cannot imagine that Congress, having vested in courts of appeals exclusive jurisdiction to review all Authority decisions *except* those relating to appropriate unit determinations, would have intended that such determinations could nevertheless be reviewed by district courts. *See Columbia Power Trades Council v. United States Dep't of Energy*, 671 F.2d 325, 327 (9th Cir. 1982) ("At no point does the Act entitle a party to petition a district court for relief. Given the broad purpose of the Act[,] . . . and the limited role of the judiciary in this statutory scheme, it is manifestly the expressed desire of Congress to create an exclusive statutory scheme.") (footnote omitted).

Although FLRA section 7123's clarity makes resort to legislative history unnecessary, we think it worth noting that the Joint Committee Report on the bill that became the FLRA declared: "As in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units." H.R. Rep. No. 95-1717, at 153 (1978). The Report does not say that there will be "no circuit court review"; it says there will be "no judicial re-view." Moreover, the Joint Committee's comparison to the "private sector" demonstrates that Congress had in mind a review scheme identical to the NLRB's, and the Supreme Court has determined that the National Labor Relations Act's preclusion of direct court of appeals review of certain matters also bars district court APA review. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987). "It would be absurd," the Supreme Court declared, to allow district court review of settlement determinations when the

NLRA expressly precludes direct review of such determinations in courts of appeals. *Id.*

In holding that FLRA section 7123 precludes direct review of Authority appropriate unit determinations, we emphasize that the Association remains free to obtain *indirect* judicial review by refusing to bargain, drawing an unfair labor practice charge, and appealing that charge to the Authority and then to a court of appeals. *See, e.g., Dep't of Energy v. FLRA*, 880 F.2d 1163, 1163-65, 1164 n.3 (10th Cir. 1989) (reviewing the Authority's unit determination in the context of an unfair labor practice proceeding). It is in this way, as the Joint Committee indicated, *see supra* at 4-5, that the FLRA parallels the NLRA. The Association claims that the existence of this indirect method of review implies that direct review should be available as well, but we rejected a virtually identical argument in *Physicians National House Staff Ass'n v. Fanning*, where a union sought APA review of an NLRB denial of a certification petition. 642 F.2d 492, 495 (D.C. Cir. 1980). Pointing out that the denial occurred in the course of an unreviewable representation proceeding, we rejected the union's argument that the district court nevertheless had jurisdiction because the union's only other means of review was through an onerous unfair labor practice proceeding. Our analysis in *Fanning* applies here as well:

> [I]t may be unlikely that the correctness of these decisions may be tested in an unfair labor practice proceeding reviewable in a court of appeals, but we think this is not a reason to permit District Court review. Congress has considered the likelihood that some Board decisions in representation proceedings may evade all judicial re-

> view. Nevertheless, it has rejected attempts to provide review in such cases.

Id. at 499.

Undeterred by all this "clear and convincing evidence" of Congressional intent to preclude judicial review, *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (citation and internal quotation marks omitted), the Association offers four unpersuasive arguments in support of its belief that the district court nevertheless had jurisdiction to entertain its challenge to the appropriate-unit determination in this case. Citing a Supreme Court case, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and a decision of this circuit, *Crowley Caribbean Transportation, Inc. v. Peña*, 37 F.3d 671 (D.C. Cir. 1994), the Association first argues that two aspects of the Authority's decision amount to "broad legal interpretation[s]" that the district court had jurisdiction to review even though they were embedded in an otherwise unreviewable decision. Appellant's Opening Br. at 24. The "broad legal determinations" the Association has in mind are the Authority's holding that the NGTA invests Adjutants General with responsibility for personnel and labor relations matters in their respective state activities, and the agency's finding that an increase in employee rights resulting from consolidation is not a relevant factor in appropriate unit determinations. The Supreme Court, however, has generally rejected "the principle that if the agency gives a reviewable reason for otherwise unreviewable action, the action becomes reviewable." *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (citation and internal quotation marks omitted). Although the cases the Association cites reveal limited exceptions to this principle, those exceptions are inapplicable here. In *McNary*, the Supreme Court held that a district court could

exercise subject matter jurisdiction over a general due process challenge to the Immigration and Naturalization Service's administration of "Special Agricultural Worker" status, even though the controlling statute made individual status determinations unreviewable. 498 U.S. at 494. Just because district courts may in some cases review generic, constitutional challenges to otherwise unreviewable agency actions hardly means that the district court in this case had jurisdiction over the Association's non-constitutional, individualized claim. Nor does our assumption in *Crowley* that a district court might have jurisdiction over an agency's articulation of its general enforcement policy, 37 F.3d at 677, support the Association's argument that district courts may review any agency legal interpretation made in the context of otherwise unreviewable individual adjudications. On the contrary, *Crowley* echoes the Supreme Court's "square[ ] reject[ion of] the notion of carving reviewable legal rulings out from the middle of non-reviewable actions." *Id.* at 676 (citing *Bhd. of Locomotive Eng'rs*, 482 U.S. at 283).

The Association next argues that the Authority's findings regarding the scope of Adjutant General responsibility and the relevance of increased employee rights are reviewable pursuant to the "rule" giving federal courts authority to review agency decisions that "erroneously disclaim jurisdiction to enforce the law[.]" Appellant's Opening Br. at 33. In support of this proposition, the Association cites a Ninth Circuit decision, *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753 (1990). That case, however, as well as a similar decision of this circuit, *International Longshoremen's Ass'n v. National Mediation Board*, 785 F.2d 1098, 1100 (D.C. Cir. 1986), held that agency *nonenforcement* decisions, normally unreviewable, *see Heckler v. Chaney*, 470 U.S. 821, 832 (1985), may be

reviewed if they rest on the agency's erroneous belief that it lacks jurisdiction. That rule does not apply here, for the Authority neither disclaimed jurisdiction nor declined to enforce the FLRA. On the contrary, the agency affirmatively exercised its statutory jurisdiction, evaluated the merits of the consolidation petition, and concluded that the proposed unit was not appropriate.

Third, the Association attempts to bring this case within the ambit of *Adams v. Richardson*, which held that district courts may exercise jurisdiction over agency action that amounts to "an abdication of . . . Congress' clear statement of an affirmative enforcement duty." 480 F.2d 1159, 1162 (D.C. Cir. 1973). Citing the agency's same two rulings about Adjutant General responsibility and the relevance of increased bargaining rights, the Association argues that the Authority abdicated its responsibility "to determine appropriate bargaining units" and "to enforce [the] mandate of [section 7112 of the Act]." Appellant's Opening Br. at 34-35. In our view, these two rulings do not come close to the "abdication" that justified district court jurisdiction in *Adams*. In that case, the Secretary of Health, Education, and Welfare declined to enforce an entire statutory scheme, Title VI of the Civil Rights Act of 1964. *Adams*, 480 F.2d at 1161. The evidence showed that the Secretary, in violation of an unambiguous statutory directive that HEW "effectuate the provisions of . . . this title," 42 U.S.C. § 2000d-1, failed to take appropriate action to terminate federal funding to segregated school systems, a failure we called "a dereliction of duty," *Adams*, 480 F.2d at 1163. The record in this case reflects no such dereliction. As we indicated above, the Authority exercised jurisdiction over the consolidation petition and ruled against the Association. The Association's claim that the agency abdicated its

enforcement responsibility represents nothing more than substantive disagreement with the agency's legal rulings.

Finally, the Association argues that the Authority's ruling amounts to the kind of "open violation of statutory authority" that the Supreme Court found reviewable in *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). "The invocation of *Leedom* jurisdiction," we have emphasized, "is extraordinary; to justify such jurisdiction, there must be a specific provision of the Act which, although it is clear and mandatory, was nevertheless violated by the [agency]." *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984) (citations and internal quotation marks omitted). In this case, the Association points to no clear violation of an unambiguous statutory provision. Instead, its arguments—that the Authority openly violated the clear mandate of the Act by determining that the NGTA prohibits nationwide consolidation of bargaining units and (again) by failing to include increased bargaining rights as a factor in its decision—merely repeat its disagreement with the agency's ruling. This falls well short of the requirements for *Leedom* jurisdiction. "That the [agency] may have made an error of fact or law is insufficient; the [agency] must have acted without statutory authority." *Fanning*, 642 F.2d at 496.

The dismissal of this case for want of jurisdiction is affirmed.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,

Plaintiff,

v.

Civil Action No. 99-2562 (GK)

FEDERAL LABOR RELATIONS AUTHORITY,

Filed Mar 31, 2001

Defendant.

MEMORANDUM OPINION

Plaintiff Association of Civilian Technicians, a labor union representing a large number of National Guard civilian technicians throughout the nation, brings this action against the Federal Labor Relations Authority. Plaintiff requests that this Court review a decision of the Authority which denied Plaintiff's petition to consolidate into a single unit various bargaining units of National Guard civilian technicians. Defendant has moved for dismissal, contending that this Court lacks subject matter jurisdiction to entertain Plaintiff's complaint.

This matter is before the Court on Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment.[1] Upon consideration of the Motion, the

[1] Plaintiff has also filed a motion for summary judgment (which can be found at pages 12 to 28 of its Memorandum in Support of its Opposition to Defendant's Motion to Dismiss). However,

Opposition, the Reply, and the entire record herein, for the reasons stated below, Defendant's Motion to Dismiss [#5] is granted.

I. PROCEDURAL BACKGROUND

Plaintiff Association of Civilian Technicians ("ACT") currently represents a majority of the National Guard civilian technicians employed in the United States.[2] Defendant the Federal Labor Relations Authority ("Authority") is the federal agency responsible for administering the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the "Statute"), which contains the exclusive statutory scheme governing labor relations between federal agencies and their employees. *See Andrade v. Lauer*, 729 F.2d 1475, 1487 (D.C. Cir. 1984). The Authority is composed of three members, pursuant to § 7104 (a) of the Statute; it has delegated certain responsibilities, including the authority to conduct hearings and issue decisions and orders, to its Regional Directors ("RDs"), pursuant to § 7105 (e) (1). A labor union or federal agency may petition the Authority to consolidate into a single unit numerous bargaining units. *See* 5 U.S.C. § 7112(d).

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consideration of Plaintiff's motion for summary judgment has been stayed, pending the Court's resolut.ion of Defendant's Motion to Dismiss.

[2] National Guard civilian technicians are civilian employees of the federal government, but are employed and administered by the Adjutant General of the particular State Guard for whom they work. They must at all times maintain military membership of appropriate rank in their respective State Guards.

On May 8, 1997, plaintiff filed such a petition, requesting that the existing bargaining units of National Guard civilian technicians in 42 individual states and territories for which Plaintiff had been certified as the exclusive representative be consolidated into a single unit. A hearing was held at various times in October 1997 and October 1998, and the RD ultimately ruled that Plaintiff's petition should be dismissed. *See* Def.'s Mot. to Dismiss, Ex. 2. Plaintiff appealed, and on July 31, 1999, the Authority affirmed the RD's dismissal of Plaintiff's petition, finding that Plaintiff's proposed consolidated unit would not satisfy § 7112 of the Statute. *See* Def.'s Mot. to Dismiss, Ex. 1 *U.S. Dep't of Defense, Nat'l Guard Bureau and Ass'n of Civilian Technicians*, 55 FLRA 657 (July 31, 1999) ("FLRA Decision").

On September 27, 1999, plaintiff brought the present action, requesting that this Court review the Authority's July 31, 1999 decision ("final order" or "final decision") which denied Plaintiff's petition to consolidate bargaining units.

II. STANDARD OF REVIEW[3]

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*,

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[3] Defendant styles its motion as a Motion to Dismiss, or, in the Alternative, for Summary Judgment. Because the Court is presently consideritng only Defendant's jurisdictional argument and is not relying on any matters outside the pleadings, the correct legal standard is one for a motion to dismiss.

355 U.S. 41, 45-46 (1957). The factual allegations of the complaint must be presumed true and liberally construed in favor of the plaintiff. *Shear v. National Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979).

III. ANALYSIS

The section of the Statute which provides for judicial review of Authority decisions is § 7123. That section provides in pertinent part:

> (a) Any person aggrieved by any final order of the Authority other than an order under--
>
> . . .
>
> (2) section 7112 of this [Statute] (involving an appropriate unit determination),
>
> may . . . institute an action for judicial review of the Authority's order in the United States court of appeals [in the appropriate circuit] . . .

5 U.S.C. § 7123 (emphasis added).

Defendant contends that based on the plain language of § 7123 and the case law interpreting it, judicial review of the Authority's decision in this case is barred. Plaintiff makes three arguments as to why § 7123 does not preclude judicial review in this case.

A. Judicial Review Under the Administrative Procedure Act

First, Plaintiff argues that this Court has jurisdiction to consider its claim under the Administrative Procedure

Act, 5 U.S.C. §§ 701-704 ("APA"), which applies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U. S. C § 701 (a). Plaintiff acknowledges that the plain language of § 7123 bars review of appropriate unit decisions by a court of appeals, but contends that the section does not say anything about review by a district court, and therefore it does not qualify as a statute that "preclude[s] judicial :review." Accordingly, Plaintiff maintains that the APA should apply, and that this Court has jurisdiction to consider its claim.

On its face, § 7123 appears to "preclude judicial review" (under 5 U.S.C. § 701(a)) of appropriate unit decisions, whether by a district court or a court of appeals; the statute establishes a specific procedure for review, and expressly exempts two categories of decisions from that procedure, one of which involves appropriate unit determinations.

Further, to the extent that there is any ambiguity whether § 7123 completely forecloses all forms of judicial that ambiguity is resolved by recourse to the legislative accompanying the section. The House-Senate Conference Committee Report discussing the final version of § 7123(a) states: "As in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units" under § 7123(a).[4]

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[4] The Authority's role in administering the Statute is analogous to the National Labor Relations Board's ("NLRB") role in administering the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-188, which governs labor relations in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 93 (1983);

H.R. Rep. No. 1717, 95th Cong., 2d Sess. 153 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2860, 2887 (emphasis added) (quoted in *United States Marshals Serv. v. FLRA*, 778 F.2d 1432, 1436 (D.C. Cir. 1985)). As it is difficult to imagine a more emphatic statement by Congress on the issue, this piece of legislative history makes the requisite "clear and convincing showing that Congress intended to prohibit" judicial review of appropriate unit decisions. *Council of Prisons Local v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (internal citations omitted).

Accordingly, because § 7123 is the "exclusive statutory scheme" for judicial review of Authority decisions, and because the section precludes judicial review of appropriate unit decisions, Plaintiff may not obtain review of the final decision pursuant to any statute, including the judicial review provisions of the APA.[5] Accordingly, the Court must reject Plaintiff's first argument.[6]

American Fed'n of Gov't Employees, Local 3748 v. FLRA, 797 F.2d 612, 613 (8th Cir. 1986).

[5] Of course, as both parties acknowledge, Plaintiff may obtain (indirect) judicial review if it engages in conduct which would trigger an unfair labor practice charge, such as refusing to bargain with the United states Department of Defense. The appeal from the Authority's final decision on that matter, under 5 U.S.C. § 7118, will then resolve the appropriate unit issue.

[6] Despite Plaitiff's argument to the contrary, Darby v. Cisneros, 509 U.S. 137 (1993), is inapposite. That caes dealt with an issue unrelated to the present case, namely, at what point a plaintiff will be considered to have exhausted his administrative remedies pursuant to § 10 of the APA. In the present case, the issue is not whether Plaintiff has "exhausted" its remedies, butr whether it may receive any direct judicial rview of its claim (i.e., its petition to consolidate).

B. Judicial Review Under *Leedom v. Kyne*

Second, Plaintiff argues that, even if the Authority's decision would otherwise be non-reviewable, the Court has jurisdiction under the narrow exception to the non-reviewability doctrine established in *Leedom v. Kyne*, 358 U.S. 184 (1958).

Leedom authorizes judicial review, by a district court, of an agency decision--even when the decision was made under a statute that precludes judicial review, such as 5 U.S.C. § 7123. Our Court of Appeals has interpreted *Leedom* as standing for the proposition that only "if an agency *openly violates a clear mandate* of a statute," will judicial review be permitted. *United States Dep't of Treasury, United States Customs Serv. v. FLRA*, 43 F.3d 682, 688 (D.C. Cir. 1994) ("*Customs Service*") (emphasis added) (citing *Leedom*, 358 U.S. at 188-91). "It is not the unavailability of a remedy which triggers the [*Leedom*] exception, but the violation of a clear statutory demand." *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 499 (D.C. Cir. 1980) (internal citations and quotations omitted). Furthermore, the Court of Appeals has emphasized that the *Leedom* exception is "intended to be of extremely limited scope," *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988),[7] and this Court is unaware of any decision in which a court has

---

The mere fact that as a practical mater Plaintiff still has recourse ot the courts, see supra note 5, does not give rise to an exhaustion issue.

[7] "For [*Leedom*] jurisdiction to exist, the [NLRB] must have stepped so plainly beyond the bounds of the [NLRA], or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court . . ." *Local 130, IUERMW v. McCulloch*, 345 F.2d 90, 95 (D.C. Cir. 1965).

applied the *Leedom* exception to permit judicial review of an otherwise unreviewable Authority decision. *See Council of Prison Locals v. Howlett*, 562 F. Supp. 849, 852 n. 7 (D.D.C. 1983), *aff'd sub nom Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984). Plaintiff contends that the Leedom exception applies in this case because the Authority openly violated the "clear mandate" of 5 U.S.C. § 7112(a), namely, "to ensure employees fullest freedom in exercising their rights" under the Statute. Pl.'s Opp'n at 11.

Upon carefully reviewing the Authority's final decision, the Court concludes that it did not "openly violate" the "clear mandate" of § 7112, so as to subject its decision to the Leedom exception.[8] *See Customs Service*, 43 F.3d at 688. In its final decision, the Authority explained why, in rejecting Plaintiff's petition, it did not give any weight to the expanded bargaining rights that would result from Plaintiff's proposed consolidated unit: the Authority concluded that the "bargaining rights" discussed in the Statute come into play only after a unit has been determined to be "appropriate" under § 7112(d). In other words, § 7112(a)'s "mandate" would not triggered with respect to a proposed consolidated unit until such a unit came into existence. While the Authority's interpretation of 7112(a) in this case is not necessarily the best or most obvious

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[8] In *Leedom*, the NLRB engaged in an "attempted exercise of power that had been specifically withheld," namely, including both professional and non-professional employees in the sane bargaining unitk even though the statute expressly prohibited such commingling. *Leedom*, 358 U.S. at 188-89. In the present case, there is no allegation that the Authority acted so egregiously in contravention of the statute it is charged to administer.

one--indeed, it may not even be upheld if it were subjected to appellate scrutiny on the merits--that does not mean that the Court can say that the Authority openly violated the statute's clear mandate.[9] Accordingly, the Court must reject Plaintiff's second argument for judicial review.[10]

C. Judicial Review of "Legal Interpretations" in Non-Reviewable Decisions

Finally, Plaintiff argues that, even if the Authority's appropriate unit decisions are not reviewable, the Court has jurisdiction to review certain "legal interpretations" included within the final agency decision in this case.

In support of this argument, Plaintiff relies on two cases, *International Union, United Auto., Aerospace and Agric. Implement Workers of Am v. Brock*, 783 F.2d 237 (D.C. Cir. 1986) ("*Brock*") and *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671 (D.C. 1994) ("*Crowley*"). However, because of the Supreme Court's decision in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), *Brock* no longer appears to be good law, at least with respect to the precise point at issue here.

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[9] For the same reason, *Heckler v. Chaney*, 470 U.S. 821 (1985) does not apply. The Authority has not refused to enforce § 7112, so as to potentially trigger *Heckler*; rather, as the Court has already found, the Authority simply construed that statute in a manner with which Plaintiff disagrees.

[10] Plaintiff also argues that Leedom applies because in its final decision the Authority "held that its jurisdiciton to determine the appropriateness of a nationwide consolidated bargaining unit . . . does not extend to the National Guard . . . " Pl.'s Opp'n at 10. This argument is rejected for the same reasons stated infra at pages 11 to 13.

See Crowley, 37 F.3d at 676. Accordingly the Court will restrict its attention to *Crowley*.

In *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671 (D.C. 1994), our Court of Appeals dealt with this precise issue, namely, whether "reviewable legal ruling" can be "carv[ed] . . . out from the middle of non-reviewable actions." *Crowley*, 37 F.3d at 676. The *Crowley* Court differentiated between agency decisions that "lay out a general policy" and which "purport to speak to a broad class of parties," and those that merely adjudicate a particular set of facts. *Id.* at 677. The former (or, rather, the legal rulings within those decisions) are reviewable; the latter are not.

Plaintiff also seeks support for its position from *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991), in which the Supreme Court was faced with a statute that, on its face, seemed to preclude all forms of judicial review of a certain category of Immigration and Naturalization Service ("INS") final decisions. Plaintiffs brought a class action alleging due process violations by INS in carrying out its review procedures. The Court ruled that judicial review was not precluded, because plaintiffs' "action [did] not seek review on the merits of a denial of a particular application" but rather sought to challenge the INS's general policy and procedures. *Id.* at 494-95.

Plaintiff contends that the final decision "held . . . that the authority of state adjutants general 'to employ and administer . . . technicians,' . . . *prohibits* the FLRA from allowing a consolidated, nationwide technician bargaining unit under 5 U.S.C. § 7112 . . ." Mem in Supp. of Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 9 (emphasis added) (quoting 32 U.S.C. §

709). Plaintiff characterizes this aspect of the decision as the type of legal interpretation which may be separately reviewed even though it is contained in a non-reviewable decision, under *Crowley* and *McNary*.

The final decision evaluated a specific set of facts (the current makeup of the National Guard, the day-to-day control the state adjutants general exercise over the civilian technicians employed in their respective states, etc.); nowhere in the decision is there a conclusion by the Authority that the Technician Act, 32 U.S.C. § 709, "prohibits" the existence of a consolidated technician bargaining unit as a matter of law under all circumstances, as Plaintiff claims. Rather, the Authority thoroughly reviewed the decision of the RD, and applied the relevant Authority precedent in concluding that Plaintiff's proposed consolidated unit would not satisfy 5 U.S.C. § 7112(a).

Section 7112 provides that:

> Two or more units which are in an agency and for which a labor organization is the exclusive representative, may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit *if the Authority considers the larger unit to be appropriate*. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

5 U.S.C. § 7112(d) (emphasis added). In determining whether a "larger unit [is] appropriate," the Authority referred to § 7112(a) of the Statute, which requires that all unit determinations made by the Authority "ensure a clear

and identifiable community of interest among the employees in the unit" and "promote effective dealings with, and efficiency of the operations of the agency involved." 5 U.S.C. § 7112(a). The Authority then applied criteria which it had established through Authority precedent (i.e., case law), to flesh out the meaning of the § 7112(a)'s term "clear and identifiable community of interest." *See, e.g.*, FLRA Decision at 658 (citing *U.S. Dept' of Justice and American Fed'n of Gov't Employees, AFL-CIO*, 17 FLRA 58 (1985)). Of particular significance, the Authority noted that it applies these criteria on a "case-by-case basis," as it adjudicates particular petitions. *Id.* at 660.

After applying and evaluating the relevant criteria, the Authority concluded that those factors disfavored Plaintiff's proposed consolidated unit. As a result, the Authority affirmed the RD's decision and denied Plaintiff's petition to consolidate.

Based on a careful reading of the final decision, the Court concludes that, in this case, the purported "legal interpretation" within the Authority's appropriate unit final decision was simply the kind of analysis and explanation used in the ordinary course of adjudicating a particular case, not the kind of "general policy" pronouncement that would subject the decision (or any portion thereof) to judicial review under the narrow exceptions established in *Crowley* and *McNary*. *See Crowley*, 37 F.3d 677. Accordingly, Plaintiff's third and final argument must fail.[11]

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[11] According to Plaintiff, the Authority made a second "legal interpretation" subject to judicial review when, to use Plaintiff's words, it "announced that an increase in employees' legal bargaining rights . .

IV. CONCLUSION

For the reasons stated, the Court concludes it lacks jurisdiction to hear Plaintiff's complaint. Accordingly, Defendant's Motion to Dismiss [#5] is granted, and this case is dismissed.

An appropriate Order will accompany this Opinion.

March 31, 2001 /s/

Gladys Kessler
U.S. District Judge

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Federal Labor Relations Authority

. is not a relevant factor in determining a unit's appropriateness." Pl.'s Opp'n at 9. Even if this characterization is accurate, see pages 8-8, this statement does not rise to the level of a "general policy" declaration subject to review under *Crowley* or *McNary*. Rather, the Authority was engaging in the kind of individualized "garden variety" decision-making that it is required to do under the Statute. *See Griffith*, 842 F.2d at 493 (holding that "[g]arden-variety errors of law of fact" do not subject an Authority decision to judicial review under *Leedom*). Further, it is important to remember that Plaintiff is not foreclosed from obtaining judicial review of the Authority's statement. *See supra* note 5.

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APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,

Plaintiff,

v.

Civil Action No. 99-2562 (GK)

FEDERAL LABOR RELATIONS AUTHORITY,

Filed Mar 31, 2001

Defendant.

ORDER

This matter is before the Court on Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment [#5]. Upon consideration of the motion, the Opposition, the Reply, and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion, it is this 31st day of March 2001,

ORDERED, that defendant's Motion to Dismiss [#5] is granted; it is further

ORDERED, that Plaintiff's Motion for an Order Requiring Defendant to File a Certified Copy of the Administrative Record [#13] is denied as moot; it is further

ORDERED, that Plaintiff's Motion for Summary Judgment [#12], [#5-2], is denied as moot; and it is further

ORDERED, that the case is dismissed.

This is a final appealable Order. *See* Fed. R. App. P. 4(a).

/s/
Gladys Kessler
U.S. District Judge

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APPENDIX D

55 FLRA No. 115

U.S. DEPARTMENT OF DEFENSE
NATIONAL GUARD BUREAU
(Activity)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Labor Organization/Petitioner)

and

WASHINGTON NATIONAL GUARD, et. al.
(Intervenors)[12]

WA-RP-70070

DECISION AND ORDER ON REVIEW

July 30, 1999

Before the Authority: Phyllis N. Segal, Chair; Donald S. Wasserman and Dale Cabaniss, Members.

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[12] The state National Guard intervenors are listed in Appendix A of this decision.

I. Statement of the Case

This case is before the Authority on Petitioner's application for review of the Regional Director's (RD's) decision dismissing its petition to consolidate separate bargaining units. 5 C.F.R. § 2422.31. The RD concluded that the proposed unit was not appropriate, as defined in section 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute). The National Guard Bureau (NGB) and 20 state National Guard intervenors filed oppositions to the application.[13]

For the following reasons, we deny the application for review of the RD's decision to dismiss the petition.

II. Background and the RD's Decision

The petition seeks to consolidate existing bargaining units in 39 states, the District of Columbia, Puerto Rico and the Virgin Islands, representing approximately 53 percent of eligible National Guard technicians nationwide.

National Guard technicians are a "hybrid class" of employee--federal civilians who work in a military environment and under the immediate control of state officers. *State of Nebraska, Military Department, Office of the Adjutant General v. FLRA*, 705 F.2d 945, 946 (8th Cir.

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[13] The Authority has determined, pursuant to 5 C.F.R. § 2429.27(d) and 5 C.F.R. § 2429.22, that the opposition filed by the Maryland State National Guard is untimely. In addition, the Authority has determined, pursuant to 5 C.F.R. § 2429.27, that the oppositions filed by the Illinois National Guard, the Kansas National Guard and the North Dakota National Guard are deficient for failure to provide a statement of service. Accordingly, these submissions have not been considered.

1983); *see New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 279-80 (3d Cir. 1982) (*NJ National Guard*). As a condition of their civilian employment, technicians must become and remain members of the National Guard, maintaining the particular military grade specified for their civilian positions. 32 U.S.C. § 709(b),(d),(e) (the Technician Act).[14]

---

[14] The Technicians Act, 32 U.S.C. § 709 states in relevant part:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians . . . .

(b) A technician employed under subsection (a) shall, while so employed--

(1) be a member of the National Guard;

. . . .

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force . . . .

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

. . . .

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned[.]

The hybrid nature of technician service reflects, in part, the unique federal-state character of the National Guard. *See generally, Perpich v. Department of Defense*, 496 U.S. 334, 340-51 (1990) (describing the history of the National Guard and the competing themes of federal and state control over guard units). Each state National Guard activity is headed by an Adjutant General, who is usually appointed by the governor. *Department of Defense, National Guard Bureau and National Federation of Federal Employees, Independent and Department of Defense, National Guard Bureau and National Association of Government Employees*, 13 FLRA 232, 234 (1983) (*National Guard*). The federal NGB is "a joint Bureau" of the Department of the Army (Army) and the Department of the Air Force (Air Force), and a liaison in coordinating the activities of the state officers, the Army, and the Air Force. *Id.* The NGB is headed by a chief who reports on National Guard matters to the Chiefs of Staff of the Army and Air Force. RD's Decision at 7.

The Technician Act provides that technicians are considered "employees" of either the Army or the Air Force. 32 U.S.C. § 709(d). The Secretary of either Department is required, however, to "designate" the Adjutants General of the states to "employ and administer" the technicians. 32 U.S.C. § 709(c). In *National Guard*, the Authority described the joint federal-state management of technicians, stating that the NGB does not employ technicians or "exercise command over any state activity[,]" but it issues regulations pertaining to technicians' conditions of employment and work life. *National Guard*, 13 FLRA at 234. These regulations are administered by a personnel officer in each state who reports directly to the Adjutant General. Labor and personnel policies are administered by each state's Adjutant General.

The Authority dismissed two petitions seeking consolidation in *National Guard*, reasoning that each state's technicians are independently supervised and are subject to independent state control over personnel, labor relations, and working conditions. The Authority also found that technicians are subject to unique state missions. Thus, the Authority concluded that the units lacked a community of interest. *See id.* at 237. The Authority also determined that consolidation would not promote effective dealings between the parties, or the efficient operation of the National Guard, because of the small number of employees involved, and because national bargaining units would not adequately reflect state control. *Id.* at 237-38.

The RD described the issue here as "whether there have been meaningful changes" since *National Guard* that might lead to a conclusion that a consolidated unit would now be appropriate under the criteria set out in section 7112(a). RD's Decision at 6. The RD stated that the "basic organization, structure and mission of the NGB and its relationship to State Activities and the employees in units proposed to be consolidated have not changed," but that some changes in National Guard operations and labor relations dealings had occurred since *National Guard*, including: NGB review of collective bargaining agreements; the establishment of a procedure for states to submit bargaining agreements for advice as to negotiability matters; the establishment of a nationwide job bulletin board; an increase in the interchange of employees of the states in connection with a test program; and evidence that more consistent contract terms have been negotiated with states. The RD also acknowledged that, if the petition were granted, the proposed consolidated unit would result in the Petitioner representing a larger number of bargaining unit

employees than did the petitioners in *National Guard*. *See* RD's Decision at 8-10 (summarizing changes).

The RD determined that the proposed consolidated unit was not appropriate under section 7112(a).

First, the RD stated that section 7112(a) requires that the proposed consolidated unit ensure a clear and identifiable community of interest. The RD applied the four-criteria test established in *U.S. Department of Justice and American Federation of Government Employees, AFL-CIO*, 17 FLRA 58 (1985) (*Department of Justice*) to determine if a community of interest had been established. The RD acknowledged that the second and third Department of Justice criteria--the organizational and geographic distribution of the employees and the degree of similarity in the occupational undertakings of the employees--favored consolidation because the Petitioner represents more technicians units in more states than the petitioners in National Guard and "these units are more evenly distributed" throughout the organization than in *National Guard*. RD's Decision at 9.

According to the RD, however, the first and fourth *Department of Justice* criteria--degree of commonality and integration of the mission and function of the components involved, and locus and scope of personnel and labor relations authority and functions--had not been met. Examining the first criteria, the RD stated that each state activity has a unique mission "and each performs slightly different functions based on that mission." *Id.* at 14. As to whether technicians' civilian and military duties are severable--and thus, the difference in state missions irrelevant--the RD concluded that "during their federal duty time [technicians] are preparing and training not only for

mobilization of federal armed forces but to perform the state military mission when called upon to do so." *Id.* at 13. The RD concluded, therefore, that the basis for the Authority's conclusion in *National Guard* as to this criteria had not changed. The RD also determined that the fourth criteria had not been satisfied. Although the RD acknowledged that changes affecting labor and employment relations have occurred since National Guard, the RD determined that the NGB has no authority to "represent the State Activities in [collective bargaining], nor does the NGB set labor relations policy for the State Activities." *Id.* According to the RD, the states through their adjutants general "retain authority over personnel and labor relations matters," indicating a lack of community of interest among state employees. *Id.* at 14. Thus, he concluded that the employees did not share a community of interest.

Second, the RD determined that consolidation would not promote effective dealings or efficient agency operations, as required under section 7112(a). The RD found that "the proposed consolidated unit would place the NGB in a position of negotiating for the State Activities without authority to do so." *Id.* The "increase in the numbers of employees represented and their distribution in the National Guard is not sufficient to overcome the effect of the retention of personnel and labor relations authority at the state level," the RD concluded. *Id.* (citing *United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia*, 52 FLRA 950, 959 (1997) (*FISC*)). Also, the RD determined that consolidation would not promote efficient agency operations "given the authority retained" by states "to separately employ technicians and to administer the technicians program[.]" *Id.*

The RD also addressed the Petitioner's argument that the Authority should consider the extent that "the unit would ensure the employees the fullest freedom in exercising their rights under the Statute." *Id.* at 15. The RD stated that, even if an "expansion of bargaining rights could result from the proposed unit[,] this does not establish that the unit meets the [section 7112(a)] criteria without which the Authority cannot find a unit to be appropriate . . . ." *Id.*

The RD, relying on an Authority Order issued on August 31, 1998, stated that he need not address Constitutional issues raised by the parties because "the proposed consolidated unit is not appropriate for exclusive recognition under the Statute[.]" *Id.* at 12.

III. Positions of the Parties

A. Petitioner

The Petitioner asserts that the RD erred by determining that section 709 of the Technicians Act requires that labor relations authority be delegated to the states and the Adjutants General.[15] The Petitioner argues that, under the statutory scheme, no such authority is delegated. Instead, according to the Petitioner, labor relations authority lies with the federal government--the Departments of the Army and Air Force--and nothing in the Act prohibits authority from being allocated "in any way the Departments desire."

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[15] In addition to legal error, the Petitioner asserts that the RD "[c]ommitted a clear and prejudicial error concerning . . . substantial factual matter[s]." Application at 1-2 (citing 5 C.F.R. 2422.31(c)(3)(iii)). The Petitioner's ground for review, however, relates to the legal relevance of facts, and no specific factual errors are argued. Therefore, we do not construe the application as challenging the specific factual findings of the RD.

Application at 6. The Petitioner contends that technicians are federal, not state, employees. In this regard, the Petitioner argues that "principles of statutory construction preclude reading the authority to control labor relations into the [state's] authority under section 709(c) of the Act" because it conflicts with the Statute. *Id.* at 8.

The Petitioner also asserts that the RD failed to apply established law in determining that the proposed consolidated unit is not appropriate. The Petitioner argues that employees in the proposed unit share a clear and identifiable community of interest, asserting that employees in the proposed unit share missions and functions that are common and prescribed by section 709(a) of the Act. In that regard, according to the Petitioner, any difference in state military missions is not relevant to determining whether this criteria has been satisfied because "technicians do not perform state missions while in technicians status." *Id.* at 16 n.14. According to the Petitioner, "current bargaining units already span the greatest degree of diversity and separation in missions and functions that exists within the National Guard"--those separating Army and Air Force components. *Id.* at 15. Further, the Petitioner argues the fact that NGB regulations address "numerous conditions of technician employment" and "apply uniformly, nationwide" to all technicians also establishes the existence of a community of interest. *Id.* at 15-16. The Petitioner also asserts that the locus and scope of personnel and labor relations supports consolidation of the proposed unit as prescribed by section 7112(a). The Petitioner contends that, although the Authority in *National Guard* concluded that labor relations was within state authority, it did so without analysis or citation to legal precedent.

Further, the Petitioner asserts that the RD should have considered in connection with the community of interest analysis that expanded bargaining rights would accrue to the proposed consolidated unit under section 7117(a)(3) of the Statute. According to the Petitioner, section 7117(a)(3) gives an exclusive representative the right to bargain over matters that otherwise would be subject to an agency's claims of compelling need, and that this is relevant to determining whether a community of interest has been established.

The Petitioner asserts that consolidation "would end unnecessary, costly, and time-consuming duplication of effort" and, thus, would promote effective dealings and the efficiency of agency operations. *Id.* at 23-24 (citing *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, AFL-CIO,* 55 FLRA 359, 361, 364 (1999) (*AFMC*).

Finally, the Petitioner asserts that the RD should have addressed the Constitutional arguments posed by the parties.

B. National Guard Bureau

The NGB argues that the RD correctly determined that the proposed consolidated unit is not appropriate under section 7112(a) of the Statute.

Addressing the Petitioner's argument that authority for labor relations under the Act does not lie with the adjutants general, the NGB states that the plain language of the Statute refutes that claim. According to the NGB, under the

Act, "the Secretary . . . cannot revoke those authorities, nor can the Secretary delegate [it] to any other person." *Id.* at 3.

Addressing the Petitioner's section 7117(a)(3) argument, the NGB states that the Petitioner's argument "ignores the plain language of 7117(a)(3), which applies only to units already deemed appropriate. *Id.*

C. Intervenors

All of the positions taken by the intervenors whose oppositions we have accepted, *see* n.2, are summarized here. A table identifying the particular argument raised by each intervenor is attached as Appendix B.

In general, the intervenors argue that the Petitioner has failed to satisfy the established criteria for granting review of an RD's decision under section 2422.31 of the Authority's Regulations. The intervenors also assert that the proposed consolidation would be inconsistent with the Technicians Act. Further, the intervenors contend that the RD properly determined that the proposed consolidated unit is not appropriate.

In addition, the Montana National Guard addresses the Petitioner's argument that section 709(c) of the Technicians Act conflicts with the Statute. According to the Montana National Guard, the Petitioner seeks repeal by implication of portions of the Technicians Act, but this is neither favored by the courts nor necessary in this instance where two statutes can be reconciled (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (*Mancari*)). The Rhode Island National Guard argues that the proposed consolidated unit is unconstitutional under Article 1, Section 8 of the U.S. Constitution.

IV. Analysis and Conclusions

Under section 7112(d) of the Statute, two or more bargaining units represented by the same union may be consolidated "if the Authority considers the larger unit to be appropriate." *See AFMC*, 55 FLRA at 361. The reference in section 7112(d) to the consolidation of "appropriate" units incorporates the appropriate unit criteria established in section 7112(a). Those criteria provide that a unit may be determined to be appropriate if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved. 5 U.S.C. § 7112(a); *AFMC*, 55 FLRA at 361-62. The Authority has identified a number of factors that indicate whether these statutory criteria are met, *see generally, FISC*, 52 FLRA at 960-61, and has consistently applied these factors on a case-by-case basis. *See Department of Justice*, 17 FLRA at 62; *Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, AFL-CIO*, 5 FLRA 657, 660-61 (1981) (*AAFES*).

The Petitioner asserts that the RD's decision misapplied the statutory criteria and erred particularly in holding that, under the Technicians Act, the states have a role in labor and employment relations. For the reasons explained below, we conclude that the RD properly construed the provisions of the Technicians Act and properly applied the appropriate unit test.

A. The state adjutants general have a role in labor relations.

The Petitioner's view is that, under the Statute and the Technician Act, labor relations is solely a federal function,

with the states having no statutory role. According to the Petitioner, "technicians are federal employees," (Application at 6), the Statute "expressly grants the federal departments full control over labor relations with technicians," (*id.* at 7), and "[s]tate authority to control labor relations cannot be read into the Technician Act." *Id.* at 8 (capitalization removed).

The Petitioner's view ignores both the hybrid nature of technician employment and the significance of the command in section 709(c) of the Act, that the "Secretary concerned shall designate the adjutant general . . . to employ and administer the technicians . . . ." The Senate report on the legislation that became the Technician Act explains that a "principal feature" of the Act is the "[r]equirement for adjutants general to be the *sole agent* for employment and administration of [the] technician program under regulations prescribed by the Secretary concerned." S.R. Rep. No. 1446 at 2, 90th Cong. 2nd Sess. (1968) (emphasis added); *see also* H.R. Rep. No. 1823, at 3321 90th Cong. 2nd Sess. 1968) (same).[16] Specifically, the Senate Report explains that the designation of the adjutants general of the states "to employ and administer the technicians" was "intended to achieve two purposes: (a) recognize the State character of the Guard and (b) meet the requirement of giving the adjutants general (who are State officers) the statutory function of employing Federal employees." S.R. Rep. No. 1446, at 15 (1968). As the U.S. Court of Appeals for the D.C. Circuit summarized, "the scheme of the [Technicians

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[16] The legislative history of the 1968 Act explains Congress' intent in enacting section 709(c). Although there have been several amendments to the Technician Act since 1968, these amendments did not alter, or relate to, section 709(c).

Act] is to create the technicians as nominal federal employees . . . and to recognize the military authority of the states through their Governors and Adjutants General to employ, command and discharge them." *American Federation of Government Employees, AFL-CIO, Local 2953 v. FLRA*, 730 F.2d 1534, 1537-38 (D.C. 1984); *see also, Johnson v. Orr*, 780 F.2d 386, 392 (3rd Cir. 1986).

In addition to the general requirement that the states employ and administer the technicians, the Technician Act identifies a number of specific employment actions as within the authority of state officials. These include the separation of employees, reductions in force, suspensions, furloughs without pay, and reductions in rank. 32 U.S.C. § 709(e). This authority is exercised "under regulations prescribed by the Secretary concerned." *Id.*

There is no specific reference in the Technician Act to the allocation of labor relations authority. Further, there is no reference to technicians in the Statute, and there is no indication that issues relating to technician bargaining were separately considered by Congress when it enacted the Statute.[17] There is, in short, no specific indication as to how Congress intended to integrate the authority set out in the Technician Act with the labor relations responsibilities set out in the Statute. Under basic rules of statutory construction, we must attempt to interpret both the Technician Act and the labor relations Statute so that they do not conflict. *Mancari*, 417 U.S. at 550. *See also NJ*

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[17] Technicians are included in the general definition of "employee" found at 5 U.S.C. § 2105 and are, therefore, subject to the provisions of Title5 relating to employees unless specifically excluded. See 5 U.S.C. § 2105(a)(1)(F).

National Guard, 677 F.2d at 282-84 (rejecting the assertion that the Technicians Act and the Statute conflicted, or that the Statute should be interpreted as overriding a provision of the Technicians Act).

The Petitioner argues that the key element in construing the Statute in this context is that the Statute defines the term "agency" as an "executive agency," which only includes federal officials. Application at 7 (*citing* 5 U.S.C. 7103(a)(3)). According to the Petitioner, any labor relations authority exercised by the states is subject to the "unfettered discretion" of federal officials, who may appoint state officials as their "representatives." *Id.*

The Petitioner's position requires that authority over labor relations be separated from authority to control employees' conditions of employment. Under the Technician Act, general authority over employment is vested in state officials--at least to some degree--as is unreviewable authority over discipline, separations, and reductions in force. The Statute requires that employees be permitted to bargain over conditions of employment, including these specific matters. *See* 5 U.S.C. § 7114, § 7106(b)(2), (3). This statutory scheme is not workable if employees do not have a right to negotiate with the same officials who exercise authority over these conditions of employment.

Although federal officials promulgate regulations governing technician working conditions, this authority is not "unfettered." They retain no authority over the day-to-day employment of the technicians. That authority is designated by statute to the states. Although states' authority under section 709(e) is exercised "under regulations prescribed by the Secretary," this caveat does not empower federal officials to direct or supervise

authority given to the states. As the Third Circuit Court of Appeals concluded in *NJ National Guard*, reconciling provisions of the Statute and the Technicians Act, "it appears quite clear from the importance Congress attached to the preservation of state control that . . . it intended to bring Guard technicians within the coverage of schemes such as the Labor-Management Act only with the provision that the state controls set out in section 709(e) would remain." *NJ National Guard*, 677 F.2d at 284. The court concluded that it could "find no evidence whatsoever that Congress in 1978 had within its contemplation the employment status of National Guard technicians." *Id.* at 285. Consistent with the foregoing, there is no basis to conclude that Congress intended that state control over technicians would be affected by the passage of the Statute, or that the Statute would have the effect of making labor relations an exclusively federal function.

The RD addressed the Petitioner's argument that the states have no necessary role in labor relations, stating that:

> [s]o long as the authority to 'employ and administer' the technicians remains with the State Activities, through their Adjutants General, the locus and scope of labor relations and personnel functions will remain with the State Activities, regardless of whether that authority exists by virtue of the Act or by some other means.

RD's Decision at 14. The RD's decision is consistent with the hybrid nature of the National Guard, the Technician Act and the Statute. Accordingly, we conclude that the RD did not err in construing the role of the states in labor relations under the Act.

B. The RD properly applied established law in determining that the proposed consolidated unit is not appropriate.

1. The RD properly evaluated the community of interest criteria.

The Petitioner asserts that, contrary to the RD's decision, the proposed consolidated unit has a clear and identifiable community of interest under section 7112(a). The RD relied on the factors set out in *Department of Justice* for determining whether employees share a community of interest, which are:

> the degree of commonality and integration of the mission and function of the components involved; the distribution of the employees involved throughout the organizational and geographical components of the agency; the degree of similarity in the occupational undertakings of the employees in the proposed unit; and the locus and scope of personnel and labor relations authority and functions.

Department of Justice, 17 FLRA at 62; *see also Naval Submarine Base, New London Naval Submarine School, Naval Submarine Support Facility New London, Personnel Support Activity New London and Naval Hospital Groton and National Association of Government Employees, Local R1-100, SEIU, AFL-CIO*, 46 FLRA 1354, 1360-61 (1993). These factors are applied on a case-by-case basis, and the Authority has not specified the number of factors needed to find a clear and identifiable community of interest. *See FISC*, 52 FLRA at 960.

As stated above, the RD acknowledged that two of the Department of Justice criteria had been met. He based his

finding that the proposed consolidated unit lacks a community of interest on the two remaining factors.

a. Similarity and integration of National Guard mission and function

With respect to the degree of commonality and integration of the mission and function of the components involved, the Authority has held that the separate missions of each component need only "bear a relationship" to one another, and the functions need only be "similar or supportive" to one another, to satisfy this appropriate unit criteria. *See AFMC* (*citing Department of the Navy, U.S. Marine Corps and American Federation of Government Employees, AFL-CIO*, 8 FLRA 15, 22 (1982)). *See also AAFES*, 5 FLRA at 661. Examining this factor in *National Guard*, the Authority stated that, "[w]hile the technicians are all working for the common mission of maintaining National Guard materiel, training its personnel, and administering its program, the employees are also subject to the unique missions established at the state level." *National Guard*, 13 FLRA at 237.

Here, the RD found that no meaningful changes had occurred to alter the conclusions reached in *National Guard*, stating that the "missions of the State Activities is significant in determining whether an appropriate unit may be established that crosses state lines" because of "the uniqueness of the [states] separate missions . . . ." RD's Decision at 13.

The Petitioner asserts that there is a "commonality of mission" within the proposed unit that would be no different than the commonality found in existing units. According to the Petitioner, "current bargaining units already span the

greatest degree of diversity and separation in missions and functions that exists within the National Guard"--those separating Army and Air Force components. Application at 15. However, the Petitioner's assertion is misdirected. The RD's decision, and the Authority's decision in *National Guard*, is based on a lack of commonality between the different missions of *the state components*, not the Army and Air Force components. Any similarity between the Army and Air Force components does not bridge the wholly different issue of diversity between states in terms of their varied missions.

The Petitioner does not dispute the RD's conclusion that state units have separate military missions. The Petitioner argues, instead, that these missions are irrelevant to our determination, because these missions are performed in military, rather than civilian status. The Petitioner does not, however, offer any reason or evidence to contradict the RD's finding that technicians prepare for state military missions while in federal civilian status.

Under our case law, the mission and function of various agency components sought to be placed in a consolidated unit is evaluated not only to determine whether these features are "similar," but also whether the mission and function are "integrated." *Department of Justice*, 17 FLRA at 62. The separate authority exercised by the states over their respective military missions indicates a lack of integration of mission and function across state lines that outweighs any similarity in the actual duties that the technicians perform while preparing for and performing these responsibilities. We thus find that the Petitioner has not demonstrated that the RD misapplied this aspect of the community of interest test.

b. Labor Relations and Personnel Authority

In determining whether a community of interest has been established, the Authority evaluates the "locus and scope of personnel and labor relations authority and functions." *Department of Justice*, 17 FLRA at 62; *AAFES*, 5 FLRA at 661. Under this factor, the Authority "looks to whether policy-making authority over personnel and labor relations policy is consistent with the proposed consolidation[.]" *AFMC*, 55 FLRA at 363.

Consistent with *National Guard*, 13 FLRA at 235, the RD found that the states set labor relations and personnel policies through their respective adjutants general. The Petitioner disagrees, asserting that the Technician Act grants "plenary authority to regulate the employment of technicians" in the Secretaries of the Army and Air Force and limits the Adjutants General to the role of "designate[d] . . . employ[ers] and administ[rators]." Application at 20 (brackets in original) (quoting 5 U.S.C. § 709(c)). The Petitioner's argument is based on its claim, addressed above, that the RD erred in his analysis of how labor relations and personnel authority is mandated under the Technician Act. For the reasons explained in § IV.A. of this decision, we have concluded that the RD did not err in this regard.

The Petitioner has not established any basis to reject the Authority's holding in *National Guard*. As we explained, the Petitioner's assertion that state authority is subordinate to federal authority in this respect ignores the hybrid authority set out in the Technician Act. A consolidation that ignored this hybrid authority would establish lines of authority for labor relations at odds with the lines of authority governing the employment of technicians in their work.

The authority of federal officials to issue regulations governing technician employment is necessarily accompanied by policy-making authority. However, the specific and irrevocable designations of authority to state officials contained in the Technician Act necessarily confers policy-making authority as well. The authority of state officials is greater than mere delegated, operational authority over day-to-day decision-making. *Cf. AFMC*, 54 FLRA at 363 (finding that the delegation of day-to-day operation of personnel and labor relations functions does not preclude consolidation). Rather, they exercise specific authority granted by the Technicians Act. Thus, the RD's conclusion is consistent with Authority precedent.

c. The Impact of Expanded Bargaining Rights.

The Petitioner asserts that RD should have considered the impact of expanded bargaining rights under section 7117(a) of the Statute in determining whether a community of interest had been established. The RD rejected this argument, stating that such a consideration is not a factor in determining a unit's appropriateness under section 7112(a).

As a matter of statutory construction, the RD's conclusion is sound. The bargaining rights discussed in Section 7117(a)(3), according to the provision's plain wording, apply only to "an exclusive representative [that] represents an appropriate unit." Thus, section 7117(a)(3) rights extended to a petitioning party only if separate bases have been satisfied and a unit determined to be appropriate.

Limitations on consolidation necessitated by the Technicians Act may have the effect of limiting the bargaining rights of these employees. However, nothing in the Statute guarantees that every group of employees will

be able to avail themselves of all aspects of the Statute. A separate statutory scheme that applies to one group of employees may place limitations on their collective bargaining rights. *See Phoenix Area Indian Health Service, Sacaton Service Unit, Hu Hu Kam Memorial Hospital, Sacaton, Arizona and Southwest Native American Health Care Employees, Local 1386, LIUNA, AFL-CIO*, 53 FLRA 1200, 1219 (1998) (noting that technicians serve under a statutory scheme that places many working conditions that are ordinarily negotiated outside the scope of bargaining).

In sum, the RD did not err in determining that the proposed consolidated unit did not share a community of interest.

2. The RD properly applied established law in determining that consolidation would not promote effective dealings or the efficiency of the agency operations.

In determining whether consolidation would promote effective dealings and efficient agency operations, the Authority examines a number of factors, including: whether personnel and labor relations authority is centralized and broad operating polices exist at the national level; whether consolidation will reduce bargaining unit fragmentation, thereby, "promoting a more effective, comprehensive bargaining unit structure to effectuate the purposes of the Statute" (*AAFES*, 5 FLRA at 661-62); and whether the unit would adequately reflect the agency's organizational structure or would require creating a new agency structure. *National Guard*, 13 FLRA at 237. As a general matter, the Authority also considers the past collective bargaining experience of the parties in making "effective dealings"

determinations. *FISC*, 52 FLRA at 961; *AFMC*, 55 FLRA at 364.

The Petitioner argues that consolidation would end the duplicative acts of negotiating separate contracts at the local level. The RD's conclusion that this criteria was not met is based, however, on his determination that the NGB is without authority to engage in collective bargaining on behalf of the states and on his determination that effective bargaining relationships currently exist. Although acknowledging that the proposed consolidated unit "represents more employees in units better distributed geographically and organizationally than the unions involved in *National Guard*," the RD relied on the retention of labor relations authority at the state level as indicating that consolidation would not be effective and would not promote efficient operations because the proposed consolidated unit would extend across state lines. RD's Decision at 14.

Essentially, the RD determined that the proposed consolidated unit would require a structuring of the National Guard inconsistent with the dictates of the Technicians Act. This determination, along with the RD's consideration that effective bargaining relationships already exist at the state level, is consistent with Authority precedent, *see AFMC*, 55 FLRA at 364, *FISC*, 52 FLRA at 961, and is also consistent with the Authority's holding in *National Guard*.

Based on the foregoing, the Authority finds that there is no basis for granting review of the RD's determination that the proposed consolidated unit would not promote effective dealings and the efficiency of agency operations.

3. The RD properly concluded that consolidation of the bargaining units was not appropriate.

In sum, the Petitioner has not established grounds warranting review of the RD's determination that a community of interest among employees was not established and that the proposed consolidated unit would not promote effective dealings and the efficiency of the National Guard's operations.[18] Since all three section 7112(a) criteria must be met for a unit to be found appropriate, *see U.S. Department of Housing and Urban Development and National Federation of Federal Employees, Independent*, 15 FLRA 497, 500 n.6 (1984), the proposed unit is not appropriate under section 7112(a) of the Statute, and the RD properly dismissed the petition.

V. Order

The Application for Review of the RD's Decision and Order is denied.

APPENDIX A

Alabama National Guard
Arkansas National Guard
Florida National Guard
Illinois National Guard
Indiana National Guard
Iowa National Guard
Kansas National Guard
Kentucky National Guard
Maryland National Guard

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[18] Because we conclude that the RD did not err, and consistent with the Authority's August 31, 1998, Order, we do not address the Constitutional arguments posed by the parties.

Michigan National Guard
Minnesota National Guard
Montana National Guard
North Dakota National Guard
Pennsylvania National Guard
Rhode Island National Guard
Tennessee National Guard
Virginia National Guard
Vermont National Guard
Washington National Guard
Wisconsin National Guard

APPENDIX B

State	5 USC. 2422.31	Title 32	Art. 1 Sec. 8	§ 7112	Other
Alabama		x		x	
Arkansas	x	x		x	
Florida	x			x	
Indiana	x			x	
Iowa		x		x	
Kentucky	x				
Michigan		x		x	
Minnesota		x		x	
Montana	x			x	Conflict of law
Pennsylvania		x		x	
Rhode Island		x	x	x	
Tennessee	x	x		x	
Vermont	x	x		x	
Virginia	x	x		x	
Washington	x				
Wisconsin	x	x		x	

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
SAN FRANCISCO REGION

DEPARTMENT OF DEFENSE
NATIONAL GUARD BUREAU,
et al.[19]
-Activity

-and-

CASE NO.
WA-RP-70070

ASSOCIATION OF CIVILIAN TECHNICIANS
-Labor Organization/Petitioner

DECISION AND ORDER DISMISSING PETITION TO CONSOLIDATE UNITS

A petition was filed with the Federal Labor Relations Authority (Authority) under section 7111(b) of the Federal Service Labor-Management Relations Statute (Statute). Section 7105(e)(1) of the Statute provides that the Authority may delegate to any Regional Director certain authorities and, in section 2422.30(c) of the Regulations, the Authority delegated to Regional Directors the authority to conduct hearings and issue Decisions and Orders. A hearing was held before a Hearing Officer of the Authority on October 28 through 30, 1997, October 19 through 23, 1998 and October 26 through 30, 1998. After completion of the hearing, the case was transferred from the Washington,

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[19] The National Guard Activities of the several states and U.S. Territories that were granted intervenor status in this case are identified in Appendix A to the decision.

D.C. Region of the Authority to the San Francisco Region of the Authority by order dated November 30, 1998. I have reviewed the Hearing Officer's rulings made at the hearing and find that they are free from prejudicial error. Accordingly, as discussed more fully below, those rulings are affirmed. Upon careful consideration of the entire record of this case, including the briefs submitted by the parties, pursuant to section 2422.30 of the Authority's Rules and Regulations, I make the following findings:

I. Statement of the Case

The petition in Case No. WA-RP-70070 was filed by the Association of Civilian Technicians (ACT) seeking consolidation under section 7112(d) of all bargaining units within the Department of Defense (DOD) for which ACT is the exclusive representative. ACT, or one of its constituent chapters, holds exclusive recognition for the units of Army and Air National Guard employees in 42 individual U.S. Territories and States (State Activities). ACT proposes to establish a consolidated unit of National Guard Bureau (NGB) employees within DOD. The NGB and all of the State Activities oppose the petition on the basis that the proposed consolidated unit is not appropriate for exclusive recognition.[20]

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[20] Each of the 42 State Activities that has a collective bargaining relationship with ACT requested and was granted intervenor status in this case. As well as opposing the petition on the basis that the proposed consolidated unit is not appropriate for exclusive recognition, some of the State Activities asserted that the proposed unit was prohibited by law or otherwise unjustified. For example, some of the State Activities asserted that establishing a nationwide, consolidated unit of NGB employees within DOD would conflict with certain provisions of the U.S. Constitution and/or with the National Guard Technician Act of 1968. As noted above, Appendix A to this decision identifies the State Activities that were granted intervenor status; this

II. Procedural History of the Case

The petition in this case was filed on May 8, 1997 with the Washington, D.C. Region of the Authority. A Notice of Representation Hearing issued in the case on June 24, 1997. The hearing was scheduled to begin on July 23, 1997. On July 6, 1997, NGB filed a Motion for Summary Dismissal of the petition. In addition, certain of the State Activities requested to intervene in the case. The scheduled hearing was postponed. Thereafter, by order dated September 22, 1997, the pending requests to intervene were granted, NGB's motion for dismissal was referred to the Hearing Officer, and the hearing was rescheduled to begin on October 27, 1997.

On October 6, 1997, NGB submitted a motion to rescind the notice of hearing and renewed its earlier motion for summary dismissal. By order dated October 7, 1997, additional State Activities were granted intervenor status in this matter. Thereafter, certain of the intervening State Activities requested to postpone the hearing, arguing that State Activities had not been given sufficient time to adequately prepare for the hearing and that funding for State Activities' participation was uncertain because the 1998 Defense Appropriations Act had not yet been signed. By order dated October 15, 1997, the Washington Regional Director denied the requested postponement. In the same order, the Regional Director granted another state's request to intervene and denied NGB's motion to rescind the notice of hearing and to dismiss the petition. The Regional Director again referred NGB's motion to dismiss to the Hearing Officer to obtain record evidence at hearing. On

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Appendix also summarizes the basis for each State Activity's opposition to the proposed consolidated unit.

October 22, 1997, additional State Activities were granted intervenor status in this case.

The hearing began on October 27, 1997 and was adjourned on October 30, 1997, after several days of testimony. At the hearing, several of the State Activities questioned whether ACT had properly served the petition in this matter. In this regard, State Activities claimed that ACT should have served all 42 of the State Activities, regardless of whether their employees were represented by ACT. In addition, some of the State Activities questioned whether NGB had authority to represent DOD, Army or Air Force in this case and asserted that ACT should have served the petition on those entities. As a result of these disputes, the hearing was adjourned and ACT was directed to serve the petition on the Adjutants General of all State Activities, on DOD and on the Secretaries of the Army and Air Force. ACT served the petition on these additional organizations on November 4, 1997 and provided evidence of service to the Washington Regional Director. Thereafter, by order dated November 20, 1997, the hearing in this matter was rescheduled for January 26, 1998.

In the interim, on January 12, 1998, one of the intervening State Activities, Rhode Island National Guard (RING) filed a motion for a stay of the proceedings, a motion to dismiss the petition, and a request for an advisory opinion from the Authority. By order dated January 15, 1998, the Washington Regional Director denied the motion for a stay and request to refer the case to the Authority for an advisory opinion. In his order, the Regional Director referred RING's motion to dismiss to the Hearing Officer to obtain record evidence at hearing. On January 13 and 16, 1998, two of the State Activities, the Florida National Guard and the Minnesota National Guard, also filed motions

to dismiss the petition. By order dated January 21, 1998, the Washington Regional Director referred these to the Hearing Officer to obtain evidence at hearing. On January 21, 1998, the Regional Director also issued a Decision and Order denying requests for intervention filed by states and territories whose employees were not affected by the issues raised in the petition because they were not members of bargaining units represented by ACT. In addition, on January 21, 1998, one of the State Activities, the Texas National Guard, filed a motion to recuse the Hearing Officer. This motion was denied by order dated January 23, 1998.

On January 23, 1998, the United States District Court for the District of Rhode Island issued a Temporary Restraining Order enjoining the Federal Labor Relations Authority from reconvening the hearing in this case until further order of the Court. On March 27, 1998, the Court vacated the Temporary Restraining Order. Thereafter, by order dated April 3, 1998, the Washington Regional Director granted requests for intervention submitted by two additional State Activities. In the same order, the Regional Director set certain procedures for conducting the reconvened hearing in this case. Subsequently, the parties submitted objections to these hearing procedures and numerous motions to rescind, reconsider or modify the Regional Director's order. By order dated June 30, 1998, the Regional Director denied these motions and requests and rescheduled the hearing on October 19, 1998. In this order, the Regional Director set further procedures for conducting the reconvened hearing.

Thereafter, RING filed with the Authority a request to recuse the Regional Director and Hearing Officer in this case. By order dated August 31, 1998, the Authority denied this request. Also, before the hearing was reconvened, on

August 18, 1998, the Regional Director issued a Decision and Order denying the request for intervention of another State Activity, because its employees are not included in existing units represented by ACT. On September 4,,1998, the Regional Director issued an order designating lead counsel for the State Activities and NGB, who had not complied with his earlier order that these parties designate two individuals to serve as their lead representatives. In a subsequent Final Notice of Hearing and Pre-Hearing Conference, dated October 9, 1998, the Regional Director rescinded this designation of lead counsel and modified the previously issued procedural orders concerning the hearing. The hearing was reconvened, as scheduled, on October 19, 1998 and continued through October 30, 1998.

By order dated June 24, 1997, the petition in Case No. SF-RP-70060 was transferred from the San Francisco Region to the Washington, D.C. Region of the Authority. Thereafter, by order dated September 22, 1997, Case No. SF-RP-70060 was consolidated with this case. Following the hiatus in the processing of the consolidated case, the petition in Case No. BN-RP- 70024 was transferred from the Boston Region to the Washington, D.C. Region of the Authority. By order dated June 30, 1998, Case No. BN-RP-70024 was consolidated with Case Nos. WA-RP-70070 and SF-RP-70060 for hearing. As noted above, after the hearing in this matter closed, the consolidated case was transferred from the Washington, D.C. to the San Francisco Region of the Authority. By order dated March 31,1998, Case No. WA-RP-70070 was severed from the consolidated case, for separate issuance of this Decision and Order.

III. Procedural Issues

An intervening State Activity, the Nebraska National Guard, filed a request to submit a brief out of time in this matter. The Activity requested to file a brief outside the time limit because its sole representative was not available to work owing to a family emergency. The request was !lot opposed and it appears that good cause has been shown to support the request. Therefore, the request of the Nebraska National Guard to file a brief out of time is granted; the brief submitted was considered in issuing this decision. Also, as discussed earlier, NGB and various State Activities submitted motions to dismiss the petition. All of these motions were referred to the Hearing Officer to obtain record evidence. Therefore, these motions are still pending and will be addressed in this decision.

During the hearing in this case, NGB and six of the State Activities offered as evidence the affidavits of individuals who were not present to testify at the hearing. Over the objections of the offering parties, these exhibits were rejected by the Hearing Officer. On brief, the parties have renewed their objections to the Hearing Officer's refusal to enter these exhibits into the hearing record. I have reviewed the Hearing Officer's rulings in this regard and find 'that they are free of prejudicial error. While a Hearing Officer has discretion to allow the admission of affidavits in lieu of testimony, this is normally done only with the consent of all parties who would otherwise be denied an opportunity to cross-examine the witnesses. In this case, where there was no mutual agreement to allow affidavits instead of testimony, the Hearing Officer's decision to reject the exhibits was fully justified. Further, there is nothing to suggest that any party was prejudiced by the Hearing Officer's refusal to receive the affidavits in the record.. The

parties were free to bring forward their witnesses to testify in person at some point during the two weeks of the hearing. In addition, to the extent that some of the parties attempted to enter additional affidavits with their post-hearing briefs, no cause has been shown to justify entering such. evidence on the record following the close of the hearing and none is apparent. Therefore, I will not order that any such affidavits be received on the record, whether already rejected by the Hearing Officer or newly submitted with briefs. *See U.S. Small Business Administration. District Office. Casper. Wyoming*, 49 FLRA 1051 (1994) (Authority refused to consider documents not submitted to the Regional Director).

The parties who had submitted motions prior to the hearing objected to the failure of the Hearing Officer to automatically include these motions on the record, as part of the formal hearing papers. Although the motions were not included in the formal hearing papers, all of the Regional Director's orders ruling on the motions were part of the formal hearing papers. The Hearing Officer overruled objections to the failure to include the motions as part of the formal papers and advised the parties that they were free to submit copies of the motions as exhibits in evidence. As the hearing progressed, the motions were received on the record as exhibits of the parties. While inclusion of these motions in the formal papers might have been a more efficient way to ensure a complete record, I find that the parties were not prejudiced by the Hearing Officer's failure to include them. In particular, as the record is complete because the motions were received in evidence, I find that the question of whether they should have been automatically included rather than entered by individual parties, is moot.

Finally, to the extent that the parties objected to the procedures used by the Hearing Officer to conduct the hearing and to his rulings on such procedural matters during the hearing, I find that the procedures used and the rulings made were free from prejudicial error. In this regard, many of the objections to procedural matters were based on the parties' inability to mutually agree on the procedures for conducting the hearing, even as to such mundane matters as the order in which the State Activities would present witnesses. In view of the parties' failure to agree on such matters prior to the hearing, the Regional Director issued orders, well in advance of the hearing, setting many of the hearing procedures. The Regional Director also modified his procedural orders based on the parties' objections to them. It is the Hearing Officer's responsibility under section 2422.21(b) of the Authority's Regulations to "take any action necessary to schedule, conduct, continue, control and regulate the hearing..." When the parties failed to agree on procedural matters by the time the hearing commenced, the Hearing Officer was required to and justified in establishing reasonable procedures for conducting the hearing, so that the parties could present evidence and examine and cross examine witnesses. I find that the parties were not prejudiced by the Hearing Officer's rulings in this regard. The rulings are affirmed.

IV. Issue of the Case

In *Department of Defense. National Guard Bureau*, 13 FLRA 232 (1983) [*National Guard*], the Authority dismissed petitions to establish consolidated units of National Guard employees. The Authority found in that case that the proposed consolidated units were not appropriate for exclusive recognition. The Authority specifically found that the technician employees in the existing units of various

State Activities did not share a community of interest at the national level and that the proposed units would not promote effective dealings with or efficiency of operations of the NGB. In this regard, the Authority found that the units met none of the three appropriate unit criteria in section 7112 of the Statute because the units would be limited to a small proportion of National Guard employees who were not distributed throughout all organizational and geographic components of the NGB and because the states exercised a high degree of control over the technicians' working conditions:

> ...While technicians are all subject to uniform regulations promulgated by the NGB, they are not subject to common overall supervision inasmuch as the NGB has no line responsibility for the employees in each state. While the technicians are all working for the common mission of maintaining National Guard materiel, training its personnel, and administering its program, the employees are also subject to the unique missions established at the state level. Further, there appears to be a near total lack of job mobility between units of the National Guard. State control over personnel, labor relations, and working conditions is statutory and not a matter of delegated authority from the NGB which the latter could rescind in the face of consolidated units. Given these. facts, the Authority finds that the petitioned for consolidated units would not ensure a clear and identifiable community of interest. among the employees involved in either proposed unit.
>
> The Authority further finds that. . .[s]uch units would not be adequately reflective of the National Guard's organizational structure. Moreover, as noted above, daily supervision, personnel authority

> and control of labor relations lies with the respective state adjutants general. This has resulted in effective bargaining relationships established at the state level or below, not only with the petitioners, but with three other labor organizations as well. Given these circumstances, with three labor organizations each representing 20-22% of the National Guard's technicians, a fourth. . .representing 8%, and with another 25% of the technicians being unrepresented, the Authority concludes that effective dealings with the National Guard, and the efficiency of its operations, would not be promoted by the proposed consolidated units.

Given the Authority's previous findings with regard to appropriateness of unit, this petition raises the issue of whether there have been meaningful changes following the Authority's *National Guard* decision that altered the operation, functions or staffing of the National Guard or the State Activities or the relationship between the NGB and the State Activities sufficient to overcome the Authority's findings concerning community of interest, effective dealings and efficiency of operations.

IV. Facts

The record in this case reflects that the basic organization, structure and mission of the NGB and its relationship to both the State Activities and the employees in the units proposed to be consolidated have not changed since the Authority's decision in *National Guard*. The record also shows that, following the *National Guard* decision, there have been certain changes in National Guard operations and in labor relations dealings. These facts, based in part, on the parties' factual stipulations are summarized below:

The National Guard is established in the District of Columbia, Guam,[21] Puerto Rico, the Virgin Islands and each of the 50 States. For decades, the Adjutant General of each State Activity has been authorized by federal law to use federal funds to employ personnel who train and administer the National Guard and maintain its equipment. The Adjutant General in each of the State Activities is the highest ranking military officer of that State. The Adjutant General of a state generally is appointed by the State Governor, but in some states the position is an elective office. The President of the United States. appoints the Adjutant General for the District of Columbia, Guam, Puerto Rico and the Virgin Islands.

In 1968, pursuant to the National Guard Technicians Act, 32 U.S.C. 709 (the Act), the employees of the State Activities became excepted service employees of the federal government, with the title of National Guard technician. In order to maintain federal civilian employment, the technicians must be members of the state National Guard and must maintain an appropriate military grade within a state National Guard unit. The technicians are covered by the federal retirement and benefits systems. However, the technicians are not authorized overtime, they are not entitled to veterans preference, and they have no appellate rights to the Merit Systems Protection Board. A small proportion of the technician work force is assigned to positions which are not subject to mobilization. These employees, who perform clerical and administrative functions, are federal civil service (Title 5) employees.

The NGB is a joint organization of the Departments of the Army and Air Force. The Chief of the NGB is directly

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[21] There are no National Guard technicians employed in Guam.

responsible for National Guard matters to the Chiefs of Staff of the Army and the Air Force. The basic mission of the NGB is to manage all of the federal funds, material and manpower allocated to the National Guard and to implement federal military policy within the National Guard. The NGB allocates to each state the funds appropriated for the National Guard by Congress and the NGB establishes manpower ceilings for each State Activity. However, the Adjutants General have the authority to reallocate funds they receive so as to best meet their particular needs.

The NGB does not employ any National Guard technicians and does not exercise military command Of control over any State Activity. Instead, the NGB is a joint staff organization of the Departments of the Army and the Air Force, responsible for liaison and coordination between the National Guard units in each state and Army and Air Force components. In addition, the Act governs the operation of the entire National Guard technician program nationwide. Pursuant to the Act, the NGB issues uniform regulations covering the conditions of employment for the technicians. These extensive regulations affect all aspects of the technicians' work life. The regulations are uniformly applied to all technicians in both the Army and Air National Guard. In addition to promulgating these uniform regulations, the NGB develops uniform position descriptions for all technician employees.

The NGB does not administer the personnel and labor relations programs for technician employees. Rather, this is the responsibility of the individual State Activities. The Adjutants General have overall authority over all personnel and labor relations matters arising in their respective State Activities. In most State Activities, these programs are administered on a day- to-day basis by a State Personnel

Management Officer (SPUME), who reports directly to the Adjutant General. All personnel programs, including employment, recruiting, training, records retention, career development, and merit promotion systems, are administered by the State Activities.

Further, each State Activity has its own operating procedures and military regulations. Each State Activity also has a military mission unique to its individual state or territory, in addition to supporting the overall national defense mission of the Departments of the Army and Air Force. For the most part, differences in mission relate to the type of military unit and hardware assigned to that State Activity, e.g. some State Activities maintain bomb ranges, while others it do not; some State Activities maintain TOW missiles and others do not. Each State Activity also has varying mission requirements based on terrain and geography within the state or territory. For example, the Washington National Guard is responsible for forest fire control in mountainous areas and flood control in coastal areas, as well as assisting in earthquake emergencies and civil defense activities.

The State Activities, through the Adjutants General, retain authority covering hiring, firing, promotion, awards and discipline of technicians. There is no appeal beyond the Adjutant General level regarding disciplinary or adverse actions or reductions in force. The State Activities, through the Adjutants General,. also retain full authority for all labor relations matters including negotiations with the exclusive representative. The NGB reviews contracts for conformance with law and regulation under section 7114(c) of the Statute and recently has implemented a procedure for State Activities to submit negotiated contracts to the NGB prior to execution for advice as to negotiability matters. The

NGB also offers State Activities advice and assistance for collective bargaining and may assist State Activity representatives in third party proceedings. The NGB does not participate in collective bargaining and the authority to negotiate a collective bargaining agreement for any particular state lies with that State Activity, through the Adjutant General.

The competitive areas for purposes of merit promotions and reductions in force are established by each State Activity and apply only to the technician employees within that state. As a practical matter, it can be difficult for a technician to move from a position in one state to another or from a position in an Air National Guard unit to one in an Army National Guard unit, as there must be both a civilian position and an equivalent military position available for the employee. In particular, to move between State Activities, the employee must not only be discharged from the military service of one state's National Guard and enlist in the National Guard in another state, but must also be selected for a civilian position under the gaining State Activity's individual merit selection procedures. Each State Activity also has its own military hiring and discharge procedures. However, in order to reduce the effects of downsizing by encouraging technicians to apply for positions with other states, the NGB recently established a national Job Bulletin Board to advertise technician vacancies nationwide.

The technician workforce nationwide is equally divided between Wage Grade (WG) employees who primarily perform equipment maintenance, avionics and electronics work, and General Schedule (GS) employees whose work primarily involves support activities, e.g. base supply, personnel, training and fiscal management. Roughly half the nationwide workforce is Army National Guard technicians

and half is Air National Guard technicians. For the most part, the State Activities maintain this same balance both between WG and GS employees and between Army and Air National Guard employees.

All provisions of the Act remain in effect, unaltered since the Authority's *National Guard* decision. In 1996, the Congress established a "charter" for the NGB, codified in 10 U.S.C. 10503, however, the role of the NGB under that section was limited to establishing programs and policies for National Guard technicians' employment under the Act. Thus, it appears that the newer legislation did not materially affect the employment situation or conditions of employment of the technicians. Specifically, the Act provides, in section 709(c) that the Secretaries of the Army and Air Force

> . . .shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

As was the case in *National Guard*, the vast majority of National Guard employees are technicians who must be members of the National Guard in their state and must maintain rank in their military guard unit, as a condition of their federal technician employment. In addition, most of the other matters discussed above, remain unchanged since 1983. However, the petition in this matter was filed by ACT, a different labor organization than those involved in *National Guard*. ACT represents more units of technician employees of more State Activities than the units that were proposed to be consolidated in *National Guard*. In addition, these units are more evenly distributed throughout the National Guard than those involved in the earlier case.

ACT represents 63 bargaining units in 39 of the 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. During the 18 months that this matter was pending hearing, the number of employees in the ACT units fluctuated, however, it appears that ACT presently holds exclusive recognition for about 53% of the approximately 38,000 unit eligible National Guard technicians nationwide. ACT represents approximately 9300 technicians in separate units of Air National Guard employees, approximately 10,500 technicians in separate units of Army National Guard employees and approximately 1800 technicians in combined units of Army and Air National Guard employees.

It is undisputed that the number of employees represented by ACT is less than 50% of the entire personnel complement of the National Guard. Among unit eligible employees, however, approximately 91% of all National Guard technicians are represented by labor organizations. Labor organizations other than ACT also represent units of National Guard employees. The National Association of Government Employees, AFl-CIO represents about 5% of the unit eligible technicians; the American Federation of Government Employees, AFL-CIO represents about 17% of the unit eligible technicians; the National Federation of Federal Employees, Independent represents about 16% of the unit eligible technicians; and the remaining 9% of those eligible for exclusive recognition are unrepresented.

Since the Authority's decision in *National Guard*, there has been some increase in the degree of interchange between employees of the State Activities in connection with a test program affecting 12 Army Aviation Support Facilities (AASF 2000). In this test program, implemented in June 1997, the 12 facilities all use the same logistics program, including a model organization structure, in order to

determine the effectiveness of such a program within the technician program. In another change implemented since the issuance of the *National Guard* decision, in February 1997, employees of the New Jersey National Guard were transferred to the New York National Guard in a reorganization of the Army National Guard Maintenance Complex at Fort Drum, New York. Prior to the reorganization, both the New Jersey and New York National Guards maintained units at the Fort Drum complex. The reorganization, which required the concurrence of the Adjutants General of New York and New Jersey, consolidated all of these operations under the New York National Guard.

An ACT representative testified without contradiction that he was personally involved in the negotiation of a collective bargaining agreement with the Montana National Guard prior to his retirement from the technician workforce and that he continued to use that contract as a guide in assisting other ACT Chapters by serving as a contract negotiator or to draft bargaining proposals and to take positions in collective bargaining with various State Activities. While he conceded that the contracts for the State Activities continue to reflect the local collective bargaining relationship and the differing concerns of the individual units, the representative's testimony established that ACT made a concerted effort to establish more consistent contract terms on a nationwide basis in collective bargaining with various State Activities on 18 different contracts. since 1986.

V. Positions of the Parties

As noted above, the positions of the individual State Activities are summarized in Appendix A to this decision. In general, however, the State Activities oppose the proposed

consolidation on the basis that a consolidated unit at the NGB level is prohibited by the Act. Certain of the State Activities also argue that the proposed consolidated unit conflicts with Article 1, Section 8 of the U.S. Constitution. In addition, one of the State Activities asserts that the proposed consolidation conflicts with the Second Amendment to the U.S. Constitution.

NGB asserts that the proposed unit would not be an appropriate unit. NGB argues that establishing a consolidated unit at the NGB level would violate the Act. NGB also claims that the Act takes precedence over the Statute. In particular, where general terms of the more recently enacted Statute conflict with the specific provisions of the Act, NGB contends that the provisions of the Act should prevail. The NGB argues that the legislative history supports a finding that the Act requires the Secretaries of the Army and Air Force to designate the Adjutants General to "employ and administer" the technicians. In addition, citing *New Jersey National Guard, 177th Fighter Interceptor Group and Department of Defense v. Federal Labor Relations Authority*, 677 F.2d 276 (1982) and *California National Guard v. Federal Labor Relations Authority*, 697 F.2d 874 (1983), the NGB contends that the Act has been held to vest in the several states the authority to administer the technician workforce.

NGB also takes the position that the proposed unit is not appropriate for the reasons stated in the Authority's decision in *National Guard*. NGB asserts that the *National Guard* decision is dispositive of the issue of unit appropriateness in this case. In this regard, NGB contends that the only substantive factual difference between this case and the *National Guard* case is the increased number of units and employees represented by ACT. NGB argues that these

facts do not support a conclusion, contrary to *National Guard*, that the employees in the proposed consolidated unit share a community of interest.

In particular, the NGB challenges ACT's stated position that the employees share a community of interest in a unit structure that would permit negotiations pursuant to section 7117(a)(3), over proposals that would conflict with NGB regulations or for which a compelling need might otherwise be asserted. In this connection, NGB argues that the bargaining rights sought by ACT are determined by the existence of an appropriate unit and cannot be used to establish a community of interest among employees. Further, NGB asserts that if a unit is found appropriate solely on the basis of 50% representation of those eligible, then loss of majority status through reduction in force or reorganization would automatically render a unit inappropriate. The NGB suggests that this is not an appropriate factor to consider in determining whether the employees share a community of interest. NGB also argues that the statutory requirement for majority status under section 7117(a)(3) should be interpreted to mandate representation of 50% of the entire personnel complement, rather than 50% of the unit eligible employees.

ACT takes the position that given the statutory preference for consolidation, when appropriate, the proposed unit should be found to meet the goal of ensuring "employees the fullest freedom in exercising the rights guaranteed" under the Statute. ACT argues that the most significant of the. rights guaranteed by the Statute is the right to engage in collective bargaining. Where, as here, a proposed unit would greatly expand the scope of bargaining for affected employees, ACT asserts that the goal of fostering the 'exercise of statutory rights to the fullest extent possible

should be given great weight in assessing whether the employees share a community of interest. ACT also asserts that the employees share a community of interest because they have a common interest in NGB regulations and in the common mission and functions of the National Guard nationwide. According to ACT, the establishment of the consolidated unit would not decrease the degree of commonality and integration of the mission and function of components. in that the unit would combine both Army and Air National Guard technicians.

ACT also contends that the State Activities do not exert control over personnel and labor relations issues. ACT argues that the Authority was mistaken in its *National Guard* finding that the State Activities exercise such control. According to ACT, the State Activities' authority in such matters is confined under the Act to administrative decision making, while the Act delegates to the NGB responsibility for issuing the regulations that govern the entire technician program. ACT also denies that the Act establishes state control over labor relations activities, technician personnel or conditions of employment, arguing that the Act actually grants the Secretaries of the Army and the Air Force the authority to regulate the employment of technicians. Based on these factors, and noting the distribution of those represented by ACT throughout the National Guard, ACT contends that the employees in the proposed consolidated unit share a community of interest. As to the remaining appropriate unit criteria, ACT takes the position that the negotiation of a single, nationwide collective bargaining agreement would result in less duplication of effort and fewer costs for the negotiation process. ACT also asserts that bargaining on the national level would eliminate the need for many current negotiations over the impact or implementation of changes in conditions of employment that take place at the local level.

In addition, ACT contends that the NGB and the State Activities have erred in their interpretation of the Act as it regards the consolidated unit. ACT argues that the Act and the Statute do not conflict and that the Act does not prohibit the establishment of a consolidated unit. Rather, according to ACT, the Act mandates that the State Activities maintain absolute authority to establish the conditions of military service of the technicians, while the NGB controls their civilian technician working conditions.

VI. Analysis and Conclusion

In analyzing this case, I first will apply the Authority's existing standard for determining whether the proposed consolidated unit is appropriate for exclusive recognition. In this regard, the Federal Labor Relations Authority is an administrative agency charged with enforcing the provisions of the Statute. In this case, the NGB and State Activities ask that the Authority make a determination that unit consolidation across state lines is impermissible under the Act and certain provisions of the U.S. Constitution. To make such determinations, it is necessary to assess how the Act and the Constitutional provisions should appropriately be interpreted and applied. As noted by the Authority in its August 31, 1998 Order in this matter:

> . . .the courts have indicated that the Authority should follow the judicial practice of avoiding constitutional questions if at all possible. *See National Treasury Employees Union v. FLM.* 986 Fold 537, 540 (D.C. Cir. 1993), *citing Meredith Corporation v. F.C.C.*, 809 F.2d 863, 872 (D.C. Cir. 1987). In a situation such as that presented here, it is appropriate to address the other, nonconstitutional issues raised by the parties prior to addressing the constitution issues raised. . .

In accordance with this guidance from the Authority, I will address the issue of unit appropriateness under section 7112(a) of the Statute. In view of my determination that the proposed consolidated unit is not appropriate for exclusive recognition under the Statute, it is not appropriate or necessary to reach other issues raised by the parties in this matter.

In *Department of Transportation, Washington, D.C.*, 5 FLRA 646 (1981), the Authority held that "with respect to section 7112(d), the Statute contains a provision intended to facilitate' consolidation of existing small units into more comprehensive ones, provided that the proposed consolidated unit is appropriate under the criteria of section 7112(a)(1)." Section 7112(d) provides:

> Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

Section 7112(a) provides, in pertinent part:

> The Authority. . . shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

In addition, in *U.S. Department of Justice*, 17 FLRA 58, 62 (1985), the Authority identified the following factors to be examined in connection with determining whether a proposed consolidated unit will ensure a clear and identifiable community of interest: the degree of commonality and integration of the mission and function of the components involved; the distribution of employees throughout the organizational and geographic components of the agency; the degree of similarity of occupational undertakings of the employees in the proposed unit; and the locus and scope of personnel and labor relations authority and functions.

In applying these factors, I note that the technicians in the proposed unit are distributed geographically throughout the National Guard and throughout both the Army and Air National Guard organizational components of the National Guard. Further, the proposed unit would involve technicians from all job classifications within the National Guard, including all of the common occupations in both the Army National Guard and Air Force National Guard. In addition, ACT represents more than 50% of the technicians in the National Guard, nationwide. Thus, the distribution of employees throughout the organizational and geographic components of the agency and the degree of similarity of occupational undertakings of the employees support the appropriateness of the proposed unit. Also, there is evidence of some increase in interchange between the State Activities given the implementation of the AASF 2000 test program and the agreement of the New York and New Jersey National Guards to establish a facility comprised of employees from both State Activities. These findings differ from the situation present in *National Guard*, in which there were fewer employees in the proposed units and in which the geographic and organizational distribution of

represented employees within the National Guard was more limited.

Despite this evidence, I find that the employees do not share a community of interest on a national level. In this regard, contrary to ACT, I find that the Authority was correct in its determination in *National Guard* that the technicians do not share a national community of interest based on the locus and scope of personnel and labor relations authority and functions. First, I note that it remains difficult for employees to transfer between State Activities, given the need to secure release from military obligations in one state and then obtain both a vacant civilian technician position and a military billet at appropriate rank with the gaining State Activity. In addition, although there is a commonality and integration of the mission and function of all components of the National Guard, as there is throughout the Army, Air Force and DOD, each of the State Activities has an individual mission unique to its state or territory and each performs slightly different functions based on that mission.

I also find that the issue of individual missions of the State Activities is significant in determining whether an appropriate unit may be established that crosses state lines. While the uniqueness of the State Activities' separate mission requirements is largely limited to their state military responsibilities, I do not agree that such military missions should be ignored in determining whether the employees share a community of interest. Thus, while ACT argues that the military mission of the states has no bearing on the technicians' federal employment, I find that these employees at all times work in support of military missions and that their mission support is not limited to separable state and federal military missions based on whether or not the guard activity has been mobilized. In this regard, during their

federal duty time they are preparing and training not only for mobilization of federal armed forces but to perform the state military mission when called upon to do so.

As to the issue that I find dispositive here, it is undisputed that NGB establishes terms and conditions of employment for all National Guard technicians by issuing the regulations that govern operation of the technician program nationally. NGB also gives labor relations advice and guidance to the State Activities. However, the NGB does not represent the State Activities in negotiations, nor does the NGB set labor relations policy for the State Activities. The State Activities, through the Adjutants General, retain full authority to hire, fire, reward, promote and discipline technicians. The Adjutants General retain authority over personnel and labor relations matters, including employment, recruitment, training, records retention, career development and merit promotion systems. The Adjutants General also retain authority to conduct reductions in force. This authority is retained not merely by the delegation of the Secretaries of the Army and Air Force, but by the requirement of the Act that this authority be so delegated to the Adjutants General.

I agree with ACT's argument that the State Activities exercise administrative authority over the personnel and labor relations programs in their individual states and territories. However, I find that by exercising this administrative authority, the State Activities retain within their individual states or territories, jurisdiction over labor and personnel matters. Thus, I find that the locus and scope of labor relations and personnel functions and authority lies at the State Activity level. The crux of the matter is that the State Activities employ the technicians, not the NGB. Thus, while the NGB determines many of the terms and conditions of employment for National Guard technicians, the

employment relationship is with the State Activities, not the NGB. So long as the authority to "employ and administer" the technicians remains with the State Activities, through their Adjutants General, the locus and scope of labor relations and personnel functions will remain with the State Activities, regardless of whether that authority exists by virtue of the Act or by some other means. So long as the locus and scope of labor relations and personnel functions remains with the State Activities, it cannot be demonstrated that a unit that crosses state lines will ensure a community of interest among the affected employees. Given all of these circumstances, I specifically find that the community of interest for National Guard employees lies at the State Activity level and, thus, that the employees do not share a community of interest at the NGB level.

Further, the evidence demonstrates that the proposed unit would not promote effective dealings with or the efficient operations of the NGB. Instead, the proposed consolidated unit would place the NGB in a position of negotiating for the State Activities without authority to do so. In addition, the present unit structure existing at the State Activity level has resulted in effective bargaining relationships established at the state level or below, not only with ACT, but with other labor organizations as well. While ACT represents more employees in units better distributed geographically and organizationally than the unions involved in *National Guard*, the factors on which the Authority based its decision in that case remain present here. Essentially, an increase in the numbers of employees represented and their distribution in the National Guard is not sufficient to overcome the effect of the retention of personnel and labor relations authority at the state level. Thus, the proposed unit would not promote effective dealings, as required under section 7112(a) of the Statute. *See U.S. Department of the Navy,*

Fleet and Industrial Supply Center, Norfolk, Virginia, 52 FLRA 950, 959 (1997) (*FISC*). In addition, given the authority retained by the several states and territories to separately employ technicians and to administer the technicians program on the State Activity level, a consolidated unit that cross State Activity lines does not bear a rationale relationship to the operational and organizational structure of the agency. Therefore, the proposed consolidated unit would not promote the efficiency of operations of the agency, as required by section 7112(a). *See, Defense Logstics Agency, Defense Supply Center, Columbus, Ohio*, 53 FLRA 1114, 1131 (1998); *U.S. Department of the Interior, National Park Service, Washington*, D.C., 55 FLRA No. 47 (March 12, 1999).

Based on the foregoing, I cannot find that the proposed unit is appropriate for exclusive recognition. *Compare, Naval Submarine Base, New London, Naval Submarine School, Naval Submarine Support Facility, New London, Personnel Support Activity, New London and Naval Hospital, Groton*, 46 FLRA 1354 (1993).

In reaching this conclusion, I have considered ACT's argument that, in determining whether a proposed unit is appropriate for exclusive recognition, the Authority should consider not only the three criteria in section 7112(a), but also the extent to which the unit would ensure the employees the fullest freedom in exercising their rights under the Statute. The latter goal, also stated in section 7112(a), describes the Authority's responsibility to determine whether a unit may be established on an agency, plant, installation, functional or other basis. It is arguable in this case that establishing the proposed consolidated unit would expand ACT's bargaining rights to include the

substance of many NGB regulations. However, section 7112(a) requires that any unit claimed to be appropriate must meet the three criteria of community of interest, effective dealings and efficiency of operations. Thus, while the expansion of bargaining rights could result from the proposed unit, this does not establish that the unit meets the three criteria without which the Authority cannot find a unit to be appropriate for exclusive recognition. Therefore, I find that consideration of this factor is not dispositive of the appropriateness of the proposed unit.

In view of my findings and determination that the proposed unit is not appropriate for exclusive recognition under the Statute, it is not necessary to reach the arguments advanced by the NGB and the State Activities that the Authority should construe the Act and certain Constitutional provisions to prohibit the establishment of the proposed unit. In view of these findings and determination, I also find that it is unnecessary to rule on the various motions to dismiss the petition which are still pending in this matter, as the motions are now moot.

Based on the foregoing, the petition in this matter is dismissed.

Pursuant to section 2422.31 of the Authority's Rules and Regulations, a party may file an application for review of this Decision and Order within sixty (60) days of the date of this Decision and Order. This sixty (60) day time limit may not be extended or waived. Copies of the application for review must be served on the undersigned and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its contents without the necessity of recourse to the record. The Authority will grant review only upon one or more of the grounds set forth in section 2422.31 (c) of the Rules and Regulations. Any application filed must contain a summary of all evidence or rulings relating to the issues raised together with page citations from the transcript, if applicable, and supporting arguments. An application may not raise any issue or allege any facts not timely presented to the Regional Director. The application for review must be filed with the Federal Labor Relations Authority, 607 14th Street, NW, Docket Room, Suite 415, Washington, DC. 20424-0001, by close of business, June 1, 1999. Pursuant to section 2422.31(3)(f) of the Regulations, neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority.

Pursuant to section 2429.21(b) of the Rules and Regulations, the date of filing shall be deemed by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been made five days prior to receipt. If the filing of the application for review is by personal or commercial delivery, it shall be considered filed on the date it is received by the Federal Labor Relations Authority.

Dated: March 31, 1999

/s/
Gerald M. Cole, Regional Director
San Francisco Region

Attachment: Appendix A

APPENDIX A

INTERVENTION OF STATE ACTIVITIES AND SUMMARY OF OPPOSITION TO PROPOSED CONSOLIDATED UNIT

State	Inter-vention	Air	Army	Air/ Army	Title 32	Arti-cle 1	Other Consti-tutional	Statute	Other
AL	9/22/97			x	x		Article 8	x	
AK	9/22/97			x				x	
AR	10/7/97	x			x		Article 8	x	
AZ	1/6/98	x			x			x	
CA	9/22/97	x			x			x	
CO	9/22/97			x	x			x	
CT	10/7/97			x	x			x	
DE	4/3/98			x	x			x	
DC	1/6/98		x		x			x	
FL	9/22/97			x	x			x	
GA	9/22/97	x	x		x	x	Amend ment 10	x	10 USC 976
IL	1/6/98		x		x			x	
IN	9/22/97	x			x			x	
IA	9/22/97	x	x		x	x		x	
KS	9/22/97	x	x					x	
KY	10/15/97	x	x		x	x		x	
ME	1/6/98		x						
MD	4/3/98	x						x	
MA	10/7/97	x			x			x	
MI	10/7/97	x			x			x	
MN	9/22/97	x1			x			x	
MO	1/6/98	x	x		x			x	
MT	10/7/97	x	x		x			x	

NE	1/6/98			x	x	x	Amend ments 10, 11	x
NV	1/6/98	x	x		x			x
NH	1/6/98	x	x		x			x
NJ	1/6/98	x			x			x
NY	1/6/98			x	x			x
NC	1/6/98		x					x
ND	4/3/98		x		x			x
PA	9/22/97	x	x		x	x		x
RI	10/7/97			x	x	x		x
TN	9/22/97	x	x		x	x		x
TX	4/3/98		x		x	x		x
VT	1/6/98	x			x	x		x
VA	10/7/97	x	x		x	x	Amend ment 10	
VI	1/6/98		x		x			x
WA	9/22/97			x	x			x
WV	4/3/98	x	x		x			x
WI	1/6/98	x			x	x		x
WY	4/3/98	x			x			x

APPENDIX F

United States Court of Appeals for the District of Columbia Circuit

No. 01-5170 September Term, 2001
99cv02562
Filed On:
May 22, 2002

Association of Civilian Technicians, Inc.
Appellant

v.

Federal Labor Relations Authority,
Appellee

BEFORE: Tatel and Garland, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing filed May 3, 2002, it is

ORDERED that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Linda Jones
Deputy Clerk

APPENDIX G

STATUTES AND REGULATION

5 U.S.C. § 701 (Excerpt)

(a) This chapter applies . . . except to the extent that--
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency.

5 U.S.C. § 702 (Excerpt)

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 703 (Excerpt)

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgment or . . . mandatory injunction . . . in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against . . . the agency by its official title. . . . Except to the extent that prior, adequate, and exclusive opportunity

for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 (Excerpt)

The reviewing court shall--

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. § 7103 (Excerpt)

(a) For the purpose of this chapter

* * *

(3) "agency" means an Executive agency.

* * *

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached.

5 U.S.C. § 7112 (Excerpt)

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of, the operations of the agency involved.

* * *

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

5 U.S.C. § 7114(c)(1)

An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

5 U.S.C. § 7117(a) (Excerpt)

(2) The duty to bargain in good faith shall . . . extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined . . . that no compelling need . . . exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

5 U.S.C. § 7123(a)

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order

involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the

United States Court of Appeals for the District of Columbia.

10 U.S.C. § 10503 (Excerpt)

The Secretary of the Army and the Secretary of the Air Force shall jointly develop and prescribe a charter for the National Guard Bureau. The charter shall cover the following matters:

* * *

(8) Establishing policies and programs for the employment and use of National Guard technicians under section 709 of title 32.

* * *

(10) Issuing directives, regulations, and publications consistent with approved policies of the Army and Air Force, as appropriate.

32 U.S.C. § 709

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in--

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who--

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary

concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(5) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians.

Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

Technician Program Regulation 250.1 ¶ 1-4e (Excerpt)

The National Guard Bureau is headed by a Chief who is . . . responsible for exercising the authority that is delegated by the Secretaries concerned. This authority includes acting for the Secretary concerned with respect to administration of the technician program. . . . This authority includes directing corrective action on any matter not found to be in accordance with applicable laws, rules, regulations, or NGB policy.

Supreme Court, U.S.
FILED
OCT 23 2002
CLERK

No. 02-283

In the Supreme Court of the United States

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction under the Administrative Procedure Act to review an appropriate unit determination of the Federal Labor Relations Authority.

2. Whether a federal district court has jurisdiction to review the legal interpretations that underlie an appropriate unit determination.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 283 F.3d 339. The opinion of the district court (Pet. App. 11a-23a) is unreported. The opinion of the Federal Labor Relations Authority (Pet. App. 27a-51a) is reported at 55 F.L.R.A. 657. The decision of the Regional Director of the Federal Labor Relations Authority (Pet. App. 52a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2002. Pet. App. 84a. A petition for rehearing was denied on May 22, 2002. The petition for a writ of certiorari was filed on August 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. National Guard dual status technicians are full-time civilian employees of the United States Departments of the Army and Air Force. Pet. App. 2a. Pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. 709, dual status technicians are employed and administered by the Adjutant General of the state Guard for whom they work. Pet. App. 2a. As a condition of their federal civilian employment, dual status technicians are required to maintain military membership in the state National Guard in which they are employed. *Ibid.*

The Association of Civilian Technicians, Inc. (petitioner) represents bargaining units of dual status technicians in 42 territories and States. Pet. App. 53a. Petitioner filed a petition with a regional office of the Federal Labor Relations Authority (FLRA), seeking to consolidate those individual state units into a single unit pursuant to Section 7112(a) of the Federal Service Labor-Management Relations Act (FSLMRA), 5 U.S.C. 7112(a). Pet. App. 53a. Section 7112(a) provides that:

> [t]he Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights under this chapter, the appropriate unit should be established on any agency, plant, installation, function, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

5 U.S.C. 7112(a).

Finding that the proposed consolidated unit was not "appropriate" within the meaning of Section 7112(a), Pet. App. 79a, the FLRA Regional Director dismissed the petition. The Regional Director specifically found that, while the extent of interchange of technicians among the various state National Guards favored a finding of appropriateness, *id.* at 75a, the individual missions, unique to each state National Guard, disfavored such a finding. *Id.* at 76a. The Regional Director also relied on the fact that state Adjutants General employ and administer the technicians in their respective States. *Id.* at 78a.

The Regional Director rejected petitioner's contention that the expanded bargaining rights petitioner would obtain if the consolidated unit was found to be appropriate should weigh in favor of a finding of appropriateness. Pet. App. 79a-80a. The Regional Director concluded that expanded bargaining rights that may accrue after a bargaining unit has been found to be appropriate are not relevant in assessing the appropriateness of a unit in the first instance. *Id.* at 80a.

2. The FLRA dismissed petitioner's application for review of the Regional Director's determination. Pet. App. 27a-51a. The FLRA affirmed the Regional Director's holding that the proposed consolidated unit met neither the "community of interest" nor the "effective dealings" and the "efficiency of [agency] operations" criteria for finding a bargaining unit to be appropriate under Section 7112(a). *Id.* at 50a. The FLRA found that the Regional Director correctly held that the day-to-day authority over the employment of technicians is vested in the state Adjutants General, and that this factor mitigates against finding a consolidated unit appropriate. *Id.* at 40a-42a. The FLRA also held that

the Regional Director properly declined to consider the expanded bargaining rights that may accrue to petitioner upon consolidation as a factor in determining the appropriateness of the proposed unit. *Id.* at 47a-48a.

3. Petitioner filed suit in the United States District Court for the District of Columbia, seeking review of the FLRA's decision under the Administrative Procedure Act (APA), 5 U.S.C. 703, 704. Pet. App. 11a. Petitioner argued that the FLRA erred in failing to give weight to the expanded bargaining rights that would result from a consolidated unit, and in relying on the authority of state Adjutants General to employ and administer technicians. *Id.* at 18a, 20a-21a. In reliance on 5 U.S.C. 7123, the FLRA moved to dismiss petitioner's complaint. Section 7123(a) provides in relevant part that:

> Any person aggrieved by any final order of the Authority other than an order under * * * section 7112 of this title (involving an appropriate unit determination), may * * * institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

5 U.S.C. 7123(a).

The district court granted the FLRA's motion to dismiss. Pet. App. 11a-24a. The court held that "because § 7123 is the 'exclusive statutory scheme' for judicial review of Authority decisions, and because the section precludes judicial review of appropriate unit decisions, [petitioner] may not obtain review of the final decision pursuant to any statute, including the judicial review provisions of the APA." *Id.* at 16a.

The district court rejected petitioner's argument that the court had jurisdiction to review the legal interpretations that formed the basis for the Authority's appropriate unit determination pursuant to *Crowley Caribbean Transport, Inc.* v. *Peña*, 37 F.3d 671 (D.C. Cir. 1994), and *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991). Pet. App. 22a. The court explained that the FLRA had engaged in "the kind of analysis and explanation used in the ordinary course of adjudicating a particular case, not the kind of 'general policy' pronouncement that would subject the decision (or any portion thereof) to judicial review under the narrow exceptions established in *Crowley* and *McNary*." *Ibid.*

4. The court of appeals affirmed, Pet. App. 1a-10a, holding that Section 7123(a)(2) precludes a district court from reviewing an appropriate unit determination. The court could not "imagine that Congress, having vested in courts of appeals exclusive jurisdiction to review all Authority decisions *except* those relating to appropriate unit determinations, would have intended that such determinations could nevertheless be reviewed by district courts." *Id.* at 5a. The court also noted that its interpretation of Section 7123 is consistent with this Court's interpretation of the judicial review provision in the National Labor Relations Act. *Ibid.* (citing *NLRB* v. *United Food & Commerical Workers Union, Local 23*, 484 U.S. 112 (1987)).

The court of appeals concluded that, under Section 7123, an appropriate unit determination may be reviewed indirectly in a court of appeals after an exclusive representative for the bargaining unit has been certified, one of the parties to the bargaining relationship refuses to bargain with the other, and the FLRA finds that refusal to constitute an unfair labor practice. Pet. App. 6a. However, the court rejected petitioner's

contention that the existence of that mechanism for review suggests that a district court may review an appropriate unit determination directly. *Ibid.*

Relying on *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987), the court of appeals also rejected petitioner's argument that the district court had jurisdiction to review statutory interpretations in the FLRA's decision, even if it lacked jurisdiction to review the decision itself. Pet. App. 7a. The court concluded that the narrow exceptions to that principle set forth in *McNary* and *Crowley* "are inapplicable here." *Id.* at 7a-8a.

ARGUMENT

The court of appeals correctly held that a district court lacks jurisdiction to review an appropriate unit determination. That holding does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioner contends (Pet. 4-7) that a district court has authority to review an appropriate unit determination under 5 U.S.C. 703 and 704, which generally permit review of final agency action for which there is no other adequate remedy in a court. The general review provisions of the APA do not apply, however, when a "statute[] preclude[s] judicial review." 5 U.S.C. 701(a). That is the situation here.

Section 7123 of the FSLMRA provides for judicial review in a court of appeals of "any final order of the Authority," except an order "involving an appropriate unit determination." 5 U.S.C. 7123(a). While Section 7123 refers only to the authority of a court of appeals, the inescapable implication of that provision is that no court may engage in direct review of an appropriate

unit determination. As the court of appeals explained, "having vested in courts of appeals exclusive jurisdiction to review all Authority decisions *except* those relating to appropriate unit determinations," Congress could not have intended that "such determinations could nevertheless be reviewed by district courts." Pet. App. 5a.

As the court of appeals recognized (Pet. App. 6a), an appropriate unit determination may be reviewed indirectly in an action challenging a final decision finding an unfair labor practice. But the existence of that *indirect* method for review of an appropriate unit determination by a *court of appeals* does not in any way suggest that a *district court* may *directly* review an appropriate unit determination. By authorizing a court of appeals to review final decisions finding an unfair labor practice, Section 7123 authorizes a court of appeals, not the district court, to review the underlying appropriate unit determinations that served as a predicate for that decision. In contrast, both by limiting review of Authority decisions to courts of appeals, and by excluding direct review of appropriate unit determinations, Section 7123 clearly precludes a district court from directly reviewing an appropriate unit determination.

This Court's construction of the analogous review scheme in the National Labor Relations Act reinforces that conclusion. Under the NLRA, a district court may not directly review an NLRB certification decision, except in the extraordinary case in which the NLRB flouts a clear statutory mandate. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-482 (1964). Absent that kind of exceptional circumstance, this Court's NLRB decisions make clear that a party may seek review of a certification decision only in a court of

appeals, and then only in the context of a review of a finding of an unfair labor practice. *Ibid.*; accord *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987). Because the Congress that enacted Section 7123 "had in mind a review scheme identical to the NLRB's" (Pet. App. 5a), the court of appeals correctly held that Section 7123 bars district court review of appropriate unit determinations.

Nothing in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), relied on by petitioner (Pet. 4), warrants a contrary conclusion. In that case, the Court held that judicial review is available under the APA unless there is "clear and convincing evidence" that Congress intended to withhold review. That standard is satisfied here. Section 7123 supplies clear and convincing evidence that Congress intended to bar direct judicial review of appropriate unit determinations.

Petitioner also errs in relying (Pet. 6) on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), and *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984). In *Bowen*, the Court held that the availability of a suit in the Court of Claims under the Tucker Act for damages does not preclude a suit for equitable relief under the APA. 487 U.S. at 904. That holding has no bearing on the question whether Section 7123 forecloses direct district court review of appropriate unit determinations.

Block fully supports the court of appeals' holding that judicial review is foreclosed in this case. In that case, the Court held that consumers of dairy products could *not* obtain judicial review under the APA of certain orders issued by the Secretary of Agriculture when a special review provision authorized only handlers of dairy products to obtain judicial review of such orders. The Court explained that while there is a presumption

favoring judicial review, that presumption is overcome when a special review provision authorizes some persons, but not others, to obtain judicial review. 467 U.S. at 349.

The situation is similar here. Section 7123 is a special review provision that provides the exclusive mechanism for review of Authority decisions, and it precludes direct review of an appropriate unit determination. A party may not circumvent that scheme by seeking direct review of an appropriate unit determination in a district court.

2. Petitioner next contends (Pet. 7-9) that even if Section 7123 forecloses direct review of appropriate unit determinations, it does not foreclose review of legal interpretations made in connection with appropriate unit determinations. That contention is foreclosed by this Court's decision in *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). In that case, the Court squarely rejected the contention that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283.

Contrary to petitioner's contention (Pet. 8), nothing in *McNary* suggests that a party may obtain judicial review of the reasons for an unreviewable action. In *McNary*, the Court held that a statutory prohibition on judicial review of individual agency denials of relief did not foreclose judicial review of a class action suit alleging that the agency had engaged in a pattern of procedural due process violations in processing applications for relief. The Court reasoned that the text of the provision at issue barred "direct judicial review of individual denials," not "collateral challenges to unconstitutional practices and policies used by the agency in processing applications." 498 U.S. at 492.

This case is distinguishable from *McNary* in every relevant respect. First, petitioner challenges the *underlying basis* of the FLRA's *substantive* decision; petitioner does not make a *collateral* challenge to the *procedures* that the FLRA uses in processing petitions. Second, petitioner argues that the FLRA has misinterpreted the *statutory* standards for making appropriate unit determinations; petitioner makes no claim that the FLRA has acted *unconstitutionally*. *McNary* is therefore inapplicable here.

Petitioner's "legal interpretation" exception is not only inconsistent with *Brotherhood of Locomotive Engineers*, and unsupported by *McNary*; it also cannot be reconciled with Section 7123. In making an appropriate unit determination, the FLRA always applies its legal interpretations of the FSLMRA to the facts of a particular case. Acceptance of petitioner's theory that a party may challenge the FLRA's legal interpretations would therefore expose every appropriate unit determination to direct judicial review. That result cannot be reconciled with Congress's considered judgment expressed in Section 7123 that appropriate unit determinations should not be subjected to direct judicial review.

3. Finally, petitioner contends (Pet. 9-13) that the FLRA's appropriate unit determination in this case rests on an erroneous interpretation of the FSLMRA. That contention does not fall within either of the questions presented by petitioner. It is therefore not properly presented here. Review of that contention is also unwarranted because, for the reasons already discussed, Section 7123 precludes direct judicial review of appropriate unit determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2002

(H)

Supreme Court, U.S.
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No. 02-283

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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5 pp

REVIEWABILITY OF THE DECISION

The government's assertion, Resp. Br. at 7, that 5 U.S.C. § 7123 "preclude[s] judicial review" of bargaining unit consolidation decisions is contradicted by the government's admission, Resp. Br. at 7, that § 7123 *allows* judicial review of these decisions. The government's attempt to escape this contradiction--by asserting that § 7123 precludes "direct," but not "indirect," review, Resp. Br. at 7--is incompatible with the legal standard governing preclusion of review. Nothing in the text or legislative history of § 7123 provides "clear and convincing evidence," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), that Congress intended review to be "indirect," but not "direct." The text and legislative history do not use these terms. They state that one form of appellate review is precluded, but do not say whether any other form of review is precluded or allowed. They provide no clear and convincing evidence for concluding that "indirect" appellate review is allowed, but "direct" district court review is precluded.

Because § 7123 *allows* judicial review of bargaining unit consolidation decisions, the forms of review available are governed by 5 U.S.C. §§ 703-704. Under §§ 703-704, the availability of indirect appellate review through unfair labor practice proceedings does not foreclose district court review because (1) Congress did not expressly provide that judicial review of unit consolidation decisions should be through unfair labor practice proceedings; (2) it is undisputed that unfair labor practice review of decisions denying union requests for unit consolidation is inadequate; and (3) district court review of these decisions would not be disruptive. *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988); *Block*

v. Community Nutrition Institute, 467 U.S. 340, 348 (1984).

The government's brief, at 8, erroneously relies on *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). There, the legislative history expressly stated the form of judicial review that Congress intended be used for the particular action in question, and stated reasons why other forms should not be used. 376 U.S. at 478-79. The government, Resp. Br. at 8, also erroneously relies on *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987). In that case, the Court held that Congress intended there to be no judicial review at all of the agency action at issue.

REVIEWABILITY OF STATUTORY INTERPRETATIONS

The government overlooks that agency announcement of a legal interpretation--whether in a regulation, an opinion, or "informal contexts such as letters," *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994)--is "agency action" subject to review under 5 U.S.C. §§ 702 and 704. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 247-48, 251 (D.C. Cir. 1986) (*Brock*) ("an agency may choose to announce interpretations through adjudications rather than through rulemakings"; the interpretation, itself, is "agency action" subject to review, even if the interpretation is announced in an unreviewable decision).

Whether a legal interpretation is reviewable "agency action" does not depend on whether the interpretation addresses a procedural, substantive, statutory, or

constitutional issue. Nothing supports the government's suggestion, Resp. Br. at 10-11, that a substantive statutory interpretation may not be reviewed. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 484 (1991), the Court held statutory interpretations subject to review. In *Brock*, the court reviewed substantive statutory interpretations. If substantive statutory interpretations are reviewable when announced in agency regulations, they are reviewable when announced in other agency documents. *Crowley*; *Brock*.

The government erroneously argues, Resp. Br. at 10, that review of substantive statutory interpretations announced in unreviewable agency decisions is foreclosed by *Interstate Commerce Comm'n v. Brhd of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). There, the Court rejected "the principle that if the agency gives a reviewable reason for otherwise unreviewable action, *the action* becomes reviewable." (Emphasis added.) Review of an interpretation announced in a decision, however, is not review of the decision. A declaration invalidating the interpretation does not vacate the decision. Standing to challenge the interpretation depends not on whether one was a party in the case that produced the decision, but on whether the legal interpretation has a prospective impact, such as an impact on possible future proceedings, that makes declaratory relief appropriate. Pet. Cert. at 8-9, n. 7.

The union here has standing to seek declaratory relief because the agency decision does not prohibit the union from filing a new unit consolidation petition. A judicial declaration invalidating one or both of the statutory interpretations that the agency announced would aid the union's pursuit of a new petition, thus making declaratory relief appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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